

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application by Verizon New England, Inc.,)	
Verizon Delaware Inc., Bell Atlantic)	
Communications, Inc. (d/b/a Verizon Long)	
Distance), NYNEX Long Distance)	WC Docket No. 02-157
Company (d/b/a Verizon Enterprise Solutions),)	
Verizon Global Networks, Inc., and Verizon)	
Select Services, Inc., for Authorization to Provide)	
In-Region, InterLATA Services in)	
New Hampshire and Delaware)	

**COMMENTS OF
FREEDOM RING COMMUNICATIONS, L.L.C. D/B/A
BAYRING COMMUNICATIONS**

Redacted for Public Inspection

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SUMMARY

Until early March, 2002, the Section 271 process was functioning as intended in the state of New Hampshire. In fact, the proceeding that the New Hampshire Public Utilities Commission (“NH PUC”) conducted should be lauded for the breadth and depth of its focus. Even Verizon describes the proceeding as “a comprehensive proceeding” entailing “submissions totaling thousands of pages” and involving “six days of hearings.”¹ At the conclusion of this proceeding, the NH PUC found that Verizon was only in compliance with Checklist Items 3, 6-10, and 12-14, and identified certain conditions to which Verizon would need to accede to demonstrate that its application was in compliance with the Section 271 competitive checklist and the public interest requirements of the Act. Thus, Verizon was out of compliance with vital checklist items including, among other things, pricing and provisioning of unbundled network elements.

Instead of acceding to these conditions as many Section 271 applicants, including Verizon itself, have done in other states, Verizon embarked on an unprecedented campaign designed to coerce the NH PUC to back down from its finding. Enlisting allies from the NH legislature, as well as funding a massive media campaign, Verizon brought improper pressure to bear on the NH PUC to change its decision. After considerable berating from Verizon’s allies in the legislature, the NH PUC did back down and allowed Verizon to agree to diluted conditions that did nothing to address the problems the NH PUC initially noted with Verizon’s application. In fact, one Commissioner, in a statement in which a second Commissioner concurred, bemoaned the lack of authority of the NH PUC to achieve the results necessary.

Verizon asks the Commission to accord “maximum deference” to the PUC’s June 14, 2002 determination, a determination it procured only through months of arm-twisting by

¹ Verizon Brief at 13.

Verizon's allies in the state legislature. This Commission has traditionally, and understandably, accorded much deference to state commission evaluations of Section 271 applications, because these thorough evaluations by state agencies who are closer to competition in their state than is the FCC, who have goals similar to the FCC, and who are objective and unbiased, provide a more complete and thorough insight into the state of competition in a particular state. The actions of Verizon and its legislative allies subsequent to the NH PUC's March 1st findings cast a dark cloud over, if not invalidate, the NH PUC's June 2002 finding in its Section 271 proceeding, *i.e.*, that Verizon has met the requirements of Section 271 based on its acceptance of diluted conditions virtually dictated by Verizon itself. Because of the coercion and duress employed to procure the NH PUC's June findings, those findings more closely represent the views of Verizon and its legislative allies than they represent the views of the NH PUC itself. This is not to say, however, that this Commission should ignore the results of the NH PUC's proceeding. The NH PUC's findings on March 1, 2002 represent its unadulterated findings in regard to Verizon's application before the improper pressure was brought to bear on the PUC. This Commission should accord "maximum deference" to the NH PUC's March 1, 2002 findings, not its June 14, 2002 findings, because the earlier findings provide the most accurate insight into the state of competition in New Hampshire.

The NH PUC was clearly troubled by Verizon's rates and, in fact, sought to have Verizon significantly reduce these rates through a reduced cost of capital and merger savings adjustment to "update and lower" rates. The NH PUC explicitly noted that its cost of capital was based on stale data, and that Verizon failed to account for savings from the Bell Atlantic/NYNEX and Bell Atlantic/GTE mergers. These factors coupled with the NH PUC's own errors in TELRIC rate making, including a misplaced reliance on the now invalidated decision of the U.S. Court of

Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*,² have led Verizon's New Hampshire rates to be the highest in the Verizon northeast region, despite costs being much higher in other states. In fact, a benchmarking analysis to rates in Vermont, which under this Commission's benchmarking test is the most appropriate state for rate comparison to New Hampshire, unequivocally demonstrates that Verizon's rates in New Hampshire far exceed a reasonable range of TELRIC rates.

The NH PUC not only found that its UNE rates were excessive and outdated, it also found that these UNE rates were creating a price squeeze that virtually precluded the development of competition, particularly in the residential market. In the state proceeding, BayRing demonstrated that there was virtually no prospect for residential competition via UNE loops or UNE-P, because entrants attempting such an approach were doomed to lose money. Verizon's contrary study is entitled to little weight because it examines the profitability of an "average" customer, which constitutes a weighted average of a business customer and a residential customer. Of course, there is no such "average" customer, and CLECs have done what they may be expected to do: They have targeted the business customer, and except for a single cable provider that has no need for Verizon's UNEs, have totally ignored the residential market. The NH PUC, in the face of this evidence, sought to take proper remedial action to rectify the situation. The rate reductions it proposed would have brought Verizon's rates in New Hampshire properly into the middle range of rates in the region.

Verizon refused to agree to these pro-competitive reductions. Instead, Verizon proposed rate reductions to UNE loops only in the rural region and a minimal switching cost reduction. As BayRing shall demonstrate, these rate reductions do not address, much less alleviate, the

² *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000).

problems the NH PUC found. What is worse is that these rate reductions are temporary as Verizon convinced the NH PUC to defer reevaluation of rates until it is granted Section 271 authority. Thus, Verizon is putting the proverbial cart before the horse by requesting this Commission to find compliance with Checklist Item 2 before permanent, TELRIC-compliant rates have been established. In fact, vital rates such as the rate for collocation power are still uncertain because Verizon has appealed the NH PUC's order on the issue. This uncertainty as to rates, when added on to the already dim prospects for competition in New Hampshire, ensures that not only is there a lack of present competition in the state, but there will be no viable competition for years to come.

Unfortunately for CLECs in New Hampshire, excessive rates are only the tip of the iceberg as to Verizon's attempts to preclude competition. Verizon fails to comply with checklist requirements in regard to dark fiber and other high capacity loop/transport facilities. For dark fiber, Verizon has so limited the amount of dark fiber that it inventories so as to effectively preclude access to this UNE. Ironically, New Hampshire, which required unbundling of dark fiber before the FCC did, has seen a staggering 84% of dark fiber inquiries returned as "facilities not available." This figure is even less understandable given Verizon's proposed fill factor for dark fiber of 50%.

For high capacity loops and transport, Verizon has artificially limited the availability of such facilities by finding that the facilities are not available unless all electronics are already attached to the facility. This policy is blatantly discriminatory because Verizon freely admits that if the customer were a retail customer it would do all it can to provide the facility.

CLECs have also experienced significant provisioning problems including one problem where service to a hospital that newly migrated to BayRing was out of service for 15 hours.

Despite numerous pleas to rectify the problem, BayRing was met with the intransigent refusal of Verizon personnel to do anything to address the situation. BayRing had to escalate the issue to Verizon's Director of Regulatory Affairs to effect what ultimately required only a few minutes of work by a Verizon switch technician. This situation is endemic of Verizon's treatment of CLECs and demonstrates its cavalier attitude in regard to public health and safety.

As if its high rates and poor provisioning was not enough to dampen competition, Verizon has engaged in anticompetitive practices to ensure that competition will not develop in New Hampshire. Verizon's actions includes delays in completing interconnection agreements, unilaterally charging improper reciprocal compensation rates, failing to meet reciprocal compensation payment obligations without following proper billing dispute procedures, requiring CLECs to agree to unnecessary and unfavorable UNE combination amendments as a condition of CLEC orders for EELs, and failure to meet the requirements of this Commission and the NH PUC in regard to dark fiber.

The Commission should either deny Verizon's application for Section 271 authority in New Hampshire or require that Verizon agree to the March 1, 2002 conditions of the NH PUC to obtain Section 271 approval. If the Commission fails to take such action, it will create a harmful precedent and imperil the integrity of the Section 271 process. In the past, applicants have been able to rectify deficiencies in their application by meeting certain conditions that address those deficiencies. Verizon refuses to meet such the badly-needed pricing conditions. This is certainly Verizon's prerogative, but until it meets such conditions, there can be no finding that Verizon meets the requirements of the competitive checklist or the public interest standard.

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**BayRing APPENDIX A – NH
(PUBLIC VERSION)**

**Selected Portions of the Record of New Hampshire Public Utilities Commission
Docket No. DT 01-151**

Tab No.	Exhibit No.	Description
1	33	Declaration of CTC Communications
2	34	Reply Declaration of CTC Communications
3	35	Declaration of Network Plus
4	37	Declaration of BayRing Communications.
5	39	Reply Declaration of BayRing Communications (PUBLIC VERSION)
6	40	Network Plus Update on Declaration
7	43	BayRing Response to VZ BR 1-13 (CONFIDENTIAL)
8	69	Pricing Declaration of BayRing & Network Plus
9	69A	Pricing Declaration of BayRing & Network Plus (CONFIDENTIAL)
10	69B	Update of Exhibit 2 of Exhibit 69A (CONFIDENTIAL)
11	Exhibit B	Exhibit B to Brief filed by BayRing, Network Plus and CTC in Docket No. DT 01-151 on January 31, 2002 (Network Plus, Inc. Responses to Verizon Data Requests VZ-NP 1-6)
12	Exhibit C	Exhibit C to Brief filed by BayRing, Network Plus and CTC in Docket No. DT 01-151 on January 31, 2002 (BayRing Communications Responses to Verizon Data Requests VZ-BR 1-12, 1-17 and 1-21)
13	Exhibit E	Exhibit E to Brief filed by BayRing, Network Plus and CTC in Docket No. DT 01-151 on January 31, 2002 (January 14, 2002 E-Mail from Kevin Minsky, Esquire, Counsel for BayRing, to Barclay Jackson, Staff of the New Hampshire Public Utilities Commission)
14		April 5, 2002 Presentation of Kate Bailey to NH Legislature
15		Deliberations Statements of Commissioner Brockway and Geiger
16		The Handbook of New Hampshire Elected Officials
17		January 9, 2002 Letter from New Jersey BPU to Verizon
18		Attachment to Record Request Nos. 66 and 68 (CONFIDENTIAL)
19		UNE Combinations Amendment and Pricing Attachment
20		Letter dated 7/3/02 from Victor D. Del Vecchio to Ms. Debra A. Howland, Executive Director and Secretary of NH Public Utilities Commission
21		Section 271 Deliberations Statement
22		Telecommunications Oversight Committee Letters to NH PUC

**BayRing APPENDIX B – NH
(NON-PUBLIC VERSION)**

**Selected Portions of the Record of New Hampshire Public Utilities Commission
Docket No. DT 01-151**

Tab No.	Exhibit No.	Description
1	39	Reply Declaration of BayRing Communications (NON-PUBLIC VERSION)
2	43	BayRing Response to VZ BR 1-13 (CONFIDENTIAL)
3	69A	Pricing Declaration of BayRing & Network Plus (CONFIDENTIAL)
4	69B	Update of Exhibit 2 of Exhibit 69A (CONFIDENTIAL)
5		Attachment to Record Request Nos. 66 and 68 (CONFIDENTIAL)

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**COMMENTS OF FREEDOM RING COMMUNICATIONS, L.L.C.
D/B/A BAYRING COMMUNICATIONS**

Freedom Ring Communications, L.L.C. d/b/a BayRing Communications (“BayRing”) submits these comments concerning the above-captioned Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware filed June 27, 2002 (“Application”).³

BayRing is a New Hampshire-owned and managed CLEC, serving business and residential customers in New Hampshire and, to a limited extent, Maine. BayRing was the first CLEC to be certified by the New Hampshire Public Utilities Commission (“NH PUC”), and the

³ Comments Requested on Verizon’s Joint Application for Authorization to Provide In-Region, InterLATA Service in Delaware and New Hampshire, Public Notice, WC Docket No. 02-157, DA 02-1497, released June 27, 2002.

first to enter into a New Hampshire interconnection agreement. It is one of only three New Hampshire CLECs singled out for discussion in Section I of Verizon's Brief.⁴

In Part I, below, BayRing responds to Verizon's assertion that this Commission should give "maximum deference" to the June 14, 2002 letter of the NH PUC. BayRing discusses the NH PUC's original March 1, 2002 letter, which found after the close of the record in the proceeding and full briefing and argument that Verizon was, in many respects, *not* in compliance with Section 271, as well as the unprecedented Verizon campaign during April and May to use improper legislative pressure to force the NH PUC to withdraw from its position, resulting in the June 14 letter.

In Part II, below, BayRing demonstrates that Verizon's New Hampshire rates are not in compliance with this Commission's TELRIC Rules. In Part III, BayRing discusses various non-cost respects in which Verizon fails to meet the competitive Checklist. In Part IV, BayRing discusses price squeeze issues and other "public interest" considerations that warrant denial of Verizon's application for in-region authority to provide InterLATA service in New Hampshire.⁵

I. WEIGHT TO BE ACCORDED TO THE RECOMMENDATION OF THE NH PUC

This Commission has repeatedly stated that it places great weight upon the recommendation of the state commission,⁶ including the state commission's report on public interest issues.⁷ Verizon relies here upon the recommendation that the NH PUC provided in its

⁴ Verizon Brief at 6-7

⁵ BayRing takes no position as to Verizon's Delaware application.

⁶ See, e.g., *New York Order* ¶ 51 ("Given the 90-day statutory deadline to reach a decision on a section 271 application . . . where the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist, we may give evidence submitted by the state substantial weight."); *Texas Order* ¶ 4 (according state commission decision "substantial weight based on the totality of its efforts and the extent of expertise it has developed on section 271 issues").

⁷ *Arkansas/Missouri 271 Order*, at ¶ 126 and n. 401.

June 14, 2002 letter, contending that the NH PUC's findings are "entitled to maximum deference."⁸ In this case, however, it is necessary to look behind the NH PUC's June 14, 2002 letter. A careful review of the facts leads to the inescapable conclusion that the NH PUC's June 14, 2002 letter was the product of improper pressure from the New Hampshire legislature, as well as an expensive public relations campaign orchestrated by Verizon. It is not in the public interest to encourage an RBOC to apply political pressure to force a state commission to reverse its position, and Verizon's campaign should not be rewarded with the grant of 271 authority. To the extent that this Commission heeds Verizon's request that it afford "maximum deference" to the findings of the NH PUC, the findings to be given deference should be the March 1, 2002 findings, the only findings that were not the product of improper legislative and political pressure.

On March 1, 2002, the NH PUC concluded that the only Checklist Items Verizon had met were numbers 3, 6-10, and 12-14. Regarding the other Checklist Items, the NH PUC asserted that:

the record reveals several areas of concern about Verizon's full compliance with certain checklist items, about its corporate commitment to serving CLEC customers, and about whether the public interest will be served by Verizon's entry into the long distance market. With respect to these items, we will only be able to conclude that Verizon NH has demonstrated that its proposal is for the public good, if it satisfies the conditions specified below.⁹

The most important of these conditions was condition 2, which would have reduced UNE rates by accounting for merger savings, as had recently been done in Rhode Island, and by using an updated cost of capital, consistent with what had recently been done in New Jersey. Condition 2 would have reduced Verizon's loop rates from being the highest in the region to approximately

⁸ Verizon Brief at 13-14.

⁹ VZ App. B-NH, Vol. 7, Tab 24, at 2.

the middle of the region.¹⁰ While between March 1 and June 11, Verizon agreed to many of the conditions specified by the NH PUC in its March 1, 2002 letter, Verizon did not agree to a reduction of loop rates, except in the rural zone. Although the proposed reduction in loop rates was clearly the most significant of the NH PUC's conditions, on June 11, 2002, the NH PUC voted to provide Verizon with a favorable recommendation, notwithstanding the lack of resolution of this issue. The record of events occurring in that time period shows that the NH PUC's change of heart was attributable more to extraordinary and improper political pressure, particularly from the New Hampshire legislature, than to a genuine reassessment of the record evidence.

The NH PUC's March 1, 2002 letter was the culmination of what Verizon itself has described as "a comprehensive proceeding" entailing "submissions totaling thousands of pages" and involving "six days of hearings."¹¹ After the letter was issued, Verizon had as one option the ability to submit its application to this Commission without a favorable recommendation from the NH PUC. Indeed, this Commission has in several instances granted an applicant Section 271 authority despite the unfavorable recommendation of the Department of Justice.¹² Alternatively, Verizon could have accepted the PUC's proposed conditions, as it has done recently in connection with its 271 applications in Vermont, Maine, and other states. Instead, Verizon mounted a legislative and public relations campaign to pressure the NH PUC into backing away from its conditions, particularly its condition regarding UNE rates.¹³

¹⁰ See BayRing App. A, Tab 14, Presentation of Kate Bailey, Director of Telecommunications, NH PUC, before New Hampshire Telecommunications Oversight Committee, April 5, 2002, at 17.

¹¹ Verizon Brief at 13.

¹² See, e.g., *Application by BellAtlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, ¶ 27 (Dec. 22, 1999).

¹³ See BayRing App. A, Tab 15, Deliberations Statement of Commissioner Brockway.

Verizon began this campaign with a March 15, 2002 letter to the NH PUC, challenging four of the NH PUC's proposed conditions, including condition 2.¹⁴ Verizon followed up with an advertising campaign urging the NH PUC to “help give consumers what New York, Massachusetts, and other Northeast states already have—lower rates . . . and great long distance service from Verizon,” and seeking to stimulate a flow of letters to the NH PUC clamoring for Verizon entry into long distance.¹⁵

Most significantly, Verizon brought heavy pressure to bear on the NH PUC from the New Hampshire legislature. That pressure was spearheaded by Representative Roy D. Maxfield, a retired 30-year Verizon employee,¹⁶ and came in the form of four public hearings, held on April 5, April 12, April 26, and May 17, 2002. These legislative hearings were highly unusual, if not unprecedented, in that they examined the NH PUC's handling of a specific docket.¹⁷ At the hearings, Representative Maxfield, and to some extent other members of the Telecommunications Oversight Committee, persistently accused the NH PUC of improperly blocking Verizon's entry into the New Hampshire long distance market, and told the NH PUC representatives that “you work for us.”¹⁸ When Staff of the NH PUC requested that the

¹⁴ DT 01-151, March 22, 2002 Letter from J. Michael Hickey, President, Verizon New Hampshire to Commissioners, New Hampshire Public Utilities Commission. A copy of the letter is found at VZ App. B-NH, Vol. 7, Tab 25.

¹⁵ See Declaration of Benjamin Thayer on Behalf of Freedom Ring Communications, LLC d/b/a BayRing Communications attached hereto, ¶ 5 (July 17, 2002) (“Thayer Declaration”).

¹⁶ See BayRing App. A, Tab 16, *The Handbook of New Hampshire Elected Officials* at 100. Representative Maxfield is listed as a retired Area Operations Manager of NYNEX, Verizon's predecessor.

¹⁷ Moreover, it is questionable whether the Telecommunications Oversight Committee even had the statutory authority to consider the issues in the NH PUC's 271 docket. The duties of the Telecommunications Oversight Committee, spelled out in Section 374:22-j of the New Hampshire General Regulations do not appear to encompass oversight of the NH PUC's responsibilities under 47 U.S.C. § 271(d)(2)(B). See N.H. Rev. Stat. § 374:22-j.

¹⁸ Thayer Declaration at ¶ 8.

Committee allow CLECs to address certain issues raised by Verizon, Rep. Maxwell stated, “I don’t care about the CLECs.”¹⁹

The Telecommunications Oversight Committee also sent the NH PUC two letters, dated May 2 and 20, 2002.²⁰ In the May 2 letter, the Telecommunications Oversight Committee first took the NH PUC to task for allowing CLECs and ISPs as “parties” to participate in the NH PUC’s determinations in the 271 docket. It also pointed out that although AT&T representatives “testified” before the Committee that “wholesale UNI [sic] rates are too high,” AT&T offers local telephone service “below these rates as part of a package in certain parts of the state.” Of course what the Committee ignored was the fact that AT&T’s offering was limited to its cable subscribers, and involved service provided by AT&T over its cable network *without the use of Verizon’s overpriced UNEs*.

The Committee openly advised the NH PUC that in the Committee’s opinion, the PUC had made a mistake, asserting that the NH PUC’s March 1 decision to qualify its recommendation with a condition regarding a reduction in Verizon’s UNE rates was “not appropriate in our opinion.” The Committee concluded by stating that: “Based on my discussions on 4/29/02 with Verizon, if [the NH PUC’s] unique and restrictive decision is not modified, New Hampshire will be put at the back of the list behind all other states in the Verizon market if they decide to compete in New Hampshire at all.”²¹

¹⁹ Thayer Declaration at ¶ 9.

²⁰ BayRing App. A, Tab 22, May 2, 2002 Letter of Representative John H. Thomas, Chairman, Telecommunications Oversight Committee to Commissioners, New Hampshire Public Utility Commission (“*May 2nd Legislature Letter*”); May 20, 2002 Letter of Representative John H. Thomas, Chairman, Telecommunications Oversight Committee to Commissioners, New Hampshire Public Utility Commission. (“*May 20th Legislature Letter*”).

²¹ *May 2nd Legislature Letter* at 2.

In its May 20, 2002 letter, the Telecommunications Oversight Committee urged the NH PUC to accept Verizon's proposal to reduce loop rates in the rural zone to \$25.00, as well as Verizon's "agree[ment] to those rates being considered temporary in nature as the commission may open a full rate investigation . . . immediately upon receipt of FCC approval." The Committee concluded by stating that "if we are correct . . . we would expect the PUC to accelerate the final stages of the application process and allow Verizon NH to move forward."²²

Under Section 271, the NH PUC's recommendation is merely advisory, does not constitute the final action of an administrative agency, and is therefore not subject to a direct appeal to a court.²³ There are nevertheless instructive precedents addressing the question of improper legislative pressure on the decision-making process of an administrative agency. For example, in *D.C. Federation of Civic Ass'ns v. Volpe*, the decision of the Secretary of Transportation to authorize construction of a certain bridge was challenged. As the D.C. Circuit noted, "[t]here is no question that the evidence indicates that strong political pressure was applied by certain members of Congress in order to secure approval of the bridge project."²⁴ The D.C. Circuit concluded that "the decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher" and remanded the case to the Secretary of

²² May 20th Legislature Letter at 1-2.

²³ The New Hampshire PUC's ruling is not a final order but is instead a consultation report. As the Court of Appeals for the D.C. Circuit has held, "[A]lthough the Commission must consult with the state commissions, the statute does not require the Commission to give State Commissions' views any particular weight." *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 416-417 (D.C. Cir. 1998). The final order in regard to Verizon's application for Section 271 authority in New Hampshire will come from this Commission and that point may be appealed to the U.S. Court of Appeals for the D.C. Circuit. See 47 U.S.C. § 402(b)(6). Moreover, any appeal to New Hampshire courts regarding the inappropriate interference of the legislature in the PUC's determinations would be rejected as untimely because all administrative remedies have not been exhausted, particularly when the administrative process may ultimately provide a suitable remedy for the aggrieved party. *Konefal v. Hollis/Brookline Cooperative School District*, 143 N.H. 256, 259 (1998). In this case, if the FCC either denies Verizon's application or requires it to accede to the conditions of the March 1, 2002 NH PUC letter then a suitable remedy is still attainable.

²⁴ 459 F. 2d 1231, 1245 (D.C. Cir.), cert. denied, 92 S.Ct. 1290 (1972), quoting *D.C. Federation of Civic Ass'ns, Inc. v. Volpe*, 316 F.Supp. 754, 762 (D.D.C. 1970).

Transportation with instructions “to make new determinations based strictly on the merits and completely without regard to any considerations not made relevant in the applicable statutes.”²⁵

The D.C. Circuit noted that the Secretary’s decision to authorize construction of the bridge was “not ‘judicial’ in that he was not required to base it solely on a formal record established at a public hearing. At the same time, it was not purely ‘legislative’ since Congress had already established the boundaries within which his discretion could operate.”²⁶ The same is true here of the NH PUC’s recommendation. Both Congress and the New Hampshire legislature have provided guidance within which the PUC must operate.²⁷ In *D.C. Federation of Civic Ass’n v. Volpe*, the members of Congress who were pressuring the Secretary of Transportation had a variety of powers over the Secretary, including the authority to withhold needed appropriations.²⁸ Likewise, the New Hampshire Telecommunications Oversight Committee has oversight authority over many matters of importance to the NH PUC.²⁹

It is inescapable that the legislative pressure placed upon the NH PUC was at least in part, if not in whole, the reason why the NH PUC changed its mind about condition 2, and provided Verizon with a favorable recommendation even though Verizon’s loop rates in the urban and suburban zones were not reduced. While this conclusion is apparent from the pressure itself, it is made much more evident by Deliberations Statements issued on June 11, 2002 by Commissioners Brockway and Geiger, who together formed a majority of the NH PUC, and

²⁵ *Id.* at 1246.

²⁶ 459 F.2d at 1247.

²⁷ 47 U.S.C. § 271; N.H. Rev. Stat. Chapter 365.

²⁸ 459 F. 2d at 1245.

²⁹ *See* N.H. Rev. Stat. § 374:22-j.

which were omitted from the record filed by Verizon.³⁰ Commissioner Brockway's

Deliberations Statement, concurred in by Commissioner Geiger, stated as follows:

This proceeding presents us with the type of situation that I hope we don't have to confront any time soon – a mandate to act without the complete authority to achieve the results necessary. We are asked by the Federal Communications Commission to give our opinion on whether Verizon should be allowed to enter the long distance market, and Verizon will not pursue an application for permission without our blessing. We gave our opinion in our letters of March 1 and April 10, 2002, specifying that Verizon must lower the rates it charges local competitors . . .

But we lack the authority to require today, over Verizon's persistent objections, the full range of changes to Verizon's treatment of local exchange competitors that we originally identified as necessary to protect local competition upon Verizon's entry into the long distance market. Verizon refused to make certain of the improvements we saw as important to safeguard local competition once Verizon was freed to enter the long distance markets. It has refused to lower its wholesale access rates for competitors and internet providers to those in nearby states. *It has appealed to the public and to the legislature*, with an incessant campaign for us to grant it long distance entry, meanwhile making only modest concessions to our authority and our policy determinations.³¹

Commissioner Geiger concurred in the above statement of Commissioner Brockway and, in addition, issued her own Deliberations Statement, in which she asserted her "concerns about Verizon's loop rates," first because of "the staleness of the data" upon which they were based, and second because "they are higher than the loop rates in our neighboring states." In addition, Commissioner Geiger asserted that "the

³⁰ By filing the June 14, 2002 letter issued by the NH PUC, *see* VZ App. B-NH, Vol. 7, Tab 30, and omitting the Deliberations Statements of the Commissioners, Verizon has attempted to provide this Commission a very distorted perspective of the views of the members of the NH PUC. There are many other respects in which Verizon has provided a selective and distorted picture of the proceedings before the NH PUC. BayRing respectfully suggests that this Commission require an applicant under Section 271 to submit all relevant portions of the record at the state commission, rather than forcing other parties, who are much less well funded, to do so themselves. In addition, because BayRing has not had the resources to identify and present to this Commission every item of evidence that supports its position, BayRing respectfully urges the FCC Staff to consult with the Staff of the NH PUC regarding the proceeding before the NH PUC.

³¹ BayRing App. A, Tab 15.

CLECs provided persuasive evidence that the existing loop rates in New Hampshire are impeding competition.”³²

It is thus manifest that at the very least a majority of the NH PUC stood by the NH PUC’s March 1 letter, and continued to believe that loop rate reductions were necessary, but felt that they had been checkmated by Verizon’s unwillingness to accede to the PUC’s conditions, combined with the legislative pressure.³³ Because of the coercion and duress employed to procure the NH PUC’s June findings, those findings more closely represent the views of Verizon and its legislative allies than they represent the views of the NH PUC itself. As the D.C. Circuit has noted in addressing a case where undue influence was alleged in regard to letters from a Congressional oversight committee to the Secretary of the Department of Transportation:

There is no reason for us to *infer* that the letters influenced his decision inasmuch as he did not reverse the ALJ’s recommendations nor was the merits decision a close one on the record. If the decision maker were suddenly to reverse course or reach a weakly-supported decision, by contrast, we might infer that pressure did influence the final decision.³⁴

Here the Commissioners actually changed course after the legislative pressure, and one Commissioner, in a statement concurred in by another Commissioner, specifically referenced the legislative pressure in explaining the NH PUC’s change of position. As the Fifth Circuit has held:

To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for

³² BayRing App. A, Tab 15.

³³ Commissioner Brockway also noted that the NH PUC had “received numerous requests from members of the public that Verizon be free to enter the long distance market.” BayRing App. A, Tab 15. It would appear that many of those requests may have been stimulated by the Verizon advertising campaign. While this type of effort to purchase public support is perfectly legal, the Commission should discount the support accordingly. BayRing has no doubt that if it had the funds to run a similar advertising campaign seeking to elicit support for the NH PUC’s March 1, 2002 position, it could have elicited a similar number of letters encouraging the NH PUC to stimulate local competition by sticking with its March 1, 2002 position.

³⁴ *ATX, Inc. v. United States Department of Transportation*, 41 F.3d 1522, 1529 (D.C. Cir. 1994).

reaching the “wrong” decision, as the Senate subcommittee did in this case, sacrifices the appearance of impartiality³⁵

It is not necessary, as in *D.C. Federation of Civic Ass’ns v. Volpe*, to send this matter back to the administrative agency to “make new determinations strictly on the merits.” Rather, in this case, we have in the form of the NH PUC’s March 1, 2002 letter, the benefit of a decision of the NH PUC that was in fact made “strictly on the merits,” and prior to the legislative arm-twisting that took place in April and May. This Commission should accord the March 1, 2002 letter, which was issued without legislative pressure, the “maximum deference” that Verizon asserts is warranted by a state commission’s findings.

II. VERIZON’S UNE RATES ARE NOT TELRIC-COMPLIANT (CHECKLIST ITEM 2)

Checklist Item 2 states that a BOC must provide “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)” of the Act.³⁶ Section 251(c)(3) requires LECs to provide “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. . . .”³⁷ Section 252(d)(1) requires that a state commission’s determination of the just and reasonable rates for network elements shall be based on the cost of providing the network elements, shall be nondiscriminatory, and may include a reasonable profit.³⁸ Pursuant to this statutory mandate, the Commission has determined that prices for

³⁵ *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952, 964 (5th Cir. 1966).

³⁶ 47 U.S.C. § 271(B)(ii).

³⁷ *Id.* § 251(c)(3).

³⁸ *Id.* § 252(d)(1).

UNEs must be based on the forward looking total element long run incremental cost (TELRIC) of providing those elements.³⁹

In reviewing past Section 271 applications for conformance with the pricing requirements of the competitive checklist, the use of incorrect inputs, outdated data, and interim rates have given this Commission cause for concern. Verizon's application has all these factors, and for good measure, throws in application of an incorrect pricing methodology. These factors, if considered independently, would each be grounds for denying the application. When the factors are considered together, they leave this Commission no other recourse but to deny this application.

The strongest testament to the flawed nature of Verizon's New Hampshire rates comes not from CLECs or third parties, but from the New Hampshire PUC itself. The PUC, recognizing that Verizon's rate structure not only did not conform with TELRIC principles, but resulted in inflated rates that precluded the development of competition in its state, notified Verizon just three months ago that it would recommend against FCC approval of Verizon's application unless Verizon agreed to lower its rates. As discussed above, rather than accede to these conditions, Verizon embarked upon a campaign waged in the legislature and media to get the NH PUC to back down from its findings. Ultimately that is what the NH PUC did by acquiescing to Verizon's diluted application of the conditions that the PUC sought to impose. In the end, Verizon refused to lower the most critical UNE rate, the analog loop rate, except in rural areas, in which demand for unbundled loops is and will be, for the foreseeable future, insignificant or nonexistent.

³⁹ See *Local Competition Order*, 11 FCC Rcd at 15844-47, ¶¶ 672-78; 47 C.F.R. §§ 51.501 *et seq.* (1999).

The NH PUC's lukewarm stamp of approval on these rates cannot mask the errors that led to the development of these inflated and temporary rates. In the following sections, BayRing will highlight some of these errors, including use of an outdated cost of capital, failure to account for Verizon merger savings, use of a cost methodology that resulted in rates in excess of what Verizon even proposed, use of temporary rates, and even application of an incorrect cost methodology. It is little wonder then that Verizon's New Hampshire rates are the highest in its region, and have impeded the development of competition. A benchmark comparison of Verizon's New Hampshire rates to its rates in Vermont, the state that provides the most appropriate comparison under the Commission's benchmark methodology, corroborates the fact that Verizon's New Hampshire rates far exceed the range of reasonable rates that application of TELRIC principles would produce.

The NH PUC, recognizing this fact, tried to rectify this situation by requesting that Verizon reduce its rates. Verizon only agreed to cosmetic reductions that it claims "respond to the PUC requirements" but in reality do little to address the deficiencies in Verizon's loop rates. Until these deficiencies are addressed and rectified, Verizon's rates cannot be found to be in conformance with the requirements of Checklist Item 2 and mandate the rejection of its application for Section 271 authority in New Hampshire.

A. Verizon's Cost of Capital Is Outdated and Inflated

In 1997, the NH PUC instituted its UNE cost proceeding, DE 97-171, and, on November 21, 2001, rendered an order on reconsideration that established the final UNE rates in that proceeding. The cost of capital in that proceeding, 10.46%, was based upon a now nearly 5-year old stipulation between Staff and Bell Atlantic based upon data is now approximately six years old. It is not clear how specifically Staff and Bell Atlantic arrived at the 10.46% figure, but it

appears that it was based at least in part on a prior arbitration award that Bell Atlantic attached to the stipulation.⁴⁰ In that award the arbitrator notes in regard to his cost of capital determination:

[w]hile not being offered as an excuse, it must be noted that above decision was rendered less than 2 hours after the last witness had finished. This was the last day of scheduled meetings and a decision had to be made so that the parties could run their respective models over the weekend in order to allow further discussion on the resulting numbers. Further analysis may have allowed for more options to be considered.⁴¹

If the cost of capital was based on this award, it certainly does not generate much confidence in the validity of the cost of capital. At any rate, the stipulation as to cost of capital and capital structure was made before any testimony was filed in DT 97-171, so there is little in the form of assurance that it properly conformed to TELRIC principles.⁴²

Even assuming *arguendo* that the cost of capital was appropriate circa 1996-1997, because significant time has past since that rate was developed, the 10.46 % cost of capital used in deriving the UNE rates is backward-looking rather than forward-looking, since it was established during a phase of the business cycle when returns on investment were far greater than those seen today. With the obvious and prevalent uncertainties in the current financial marketplace, it is common knowledge that stockholder expectations regarding their return on investment have dramatically deflated. Therefore, UNE rates established by the NH PUC in DE 97-171 are not forward looking but rather are impermissibly inflated because they are based on an excessive cost of capital.

⁴⁰ It is not evident in Verizon's application how the cost of capital figure to which Staff and Verizon stipulated to was reached. Verizon attached excerpts from an arbitration award to the stipulation letter which suggests that it may have been based, at least in part, on that arbitration award. See, VZ App. M-NH, Tab 3.

⁴¹ DE 97-171, March 4, 1998 Letter from Victor Del Vecchio to E. Barclay Jackson, Hearing Examiner. A copy of the letter is located at VZ App. M-NH, Tab 3.

⁴² See DE 97-171 (Track 2), Stipulation Regarding Recurring Charges Proposed In Bell Atlantic-New Hampshire's SGAT Filing at 4 (July 14, 1998). A copy of this document is located at VZ App. I-NH, Tab 2.

By way of background, the backward looking cost of capital that Verizon's UNE rates are based derives from the following capital structure:

Type of Capital	Ratio	Cost Rate	Weighted Cost
Debt	39.35%	7.01%	2.758%
Equity	60.65%	12.70%	7.703%
	100.00%		10.461%

To the disadvantage of both CLECs and competition, the 10.461% weighted cost of capital that Verizon currently enjoys in its UNE rates is quite excessive when compared to the 8.8% weighted cost of capital ordered by the New Jersey Board of Public Utilities ("NJ BPU") on November 20, 2001.⁴³ The updated 8.8% cost of capital adopted by the NJ BPU is based on a sensible 10% cost of equity, whereas the antiquated 10.46% cost capital used by Verizon in this proceeding is based on an overblown and unrealistic 12.7% cost of equity.⁴⁴ Verizon's current cost of equity is 2.7% percentage points (or 27% higher) than the cost of equity recently adopted by the NJ BPU.

Obviously, for UNE prices to be forward looking and TELRIC compliant, the weighted cost of capital that drives the establishment of UNE rates must also be forward looking. In this case, the cost of capital used by Verizon is entirely outmoded and must be revised and updated. The NH PUC agreed and required that Verizon recalculate the rates in the CLEC tariff using an 8.42% overall cost of capital, based on Verizon's current debt to equity ratio, Verizon's current

⁴³ New Jersey Board of Public Utilities, Docket No. TO00060356, Decision and Order at 37-40 (March 6, 2002) ("*NJ UNE Order*"). The NJ BPU issued a summary order on November 20, 2001 and issued the final order on March 6, 2002.

⁴⁴ See WC 02-157, Verizon Application, Joint Declaration of J. Michael Hickey, Patrick A. Garzillo, and Michael J. Anglin at ¶ 47 (June 27, 2002) ("*Hickey/Garzillo/Anglin Declaration*").

cost of debt, and 10% return on equity as used in New Jersey.⁴⁵ The Commissioners explicitly noted that they were requiring this modification in cost of capital to “update and appropriately lower UNE rates.”⁴⁶ As Staff of the NH PUC conceded, the rates the Commission approved in its *July 6th Order* were based on a cost of capital that was stipulated to in 1997 and not litigated or specifically addressed in the *July 6th Order*.⁴⁷ In the face of Verizon’s opposition to the newly proposed cost of capital, Staff recommended keeping the 8.42% cost of capital because Staff “remains convinced that a 10% ROE is reasonable in today’s market.”⁴⁸ Verizon continued to maintain its objection to an updated cost of capital and the NH PUC capitulated.

B. Verizon’s UNE Prices are Inappropriately Inflated Because They Do Not Reflect Merger Savings

When Bell Atlantic merged with NYNEX and when Bell Atlantic merged with GTE, the parties made a number of public declarations, particularly to this Commission, often under oath or with penalty for misrepresentations, about the savings that would result – and have resulted – from these mergers.

Verizon has not accounted for operating cost savings it represented to regulators and the public at large that it will enjoy as the result of its efforts at process reengineering and its these mergers. Verizon contended before the NH PUC that its cost studies already reflected merger savings, but Verizon filed its cost studies in DT 97-171 on or about March 13, 1998. The Bell Atlantic/GTE merger was not announced until about July 27, 1998 and was not completed until

⁴⁵ DT 01-151, March 1, 2002 Letter from Commissioners, New Hampshire Public Utilities Commission to J. Michael Hickey, President, Verizon New Hampshire at 2. (“*NH PUC Conditions Letter*”). A copy of the letter is found at VZ App. B-NH, Vol. 7, Tab 24.

⁴⁶ *Id.* at 4.

⁴⁷ DT 01-151, May 5, 2002 Staff Report and Recommendation at 1 (“*May 5th Staff Report*”). A copy of this report is found at VZ App. B-NH, Vol. 7, Tab 27.

⁴⁸ *May 5th Staff Report* at 2.

June 20, 2000.⁴⁹ Thus, there would not have been, and could not have been, any account of savings from the Bell Atlantic/GTE merger in Verizon's cost studies. Witnesses in DT 97-171 noted that Verizon had failed to account properly for savings from the Bell Atlantic/NYNEX merger.⁵⁰

The Rhode Island Public Utilities Commission ("RI PUC") recently reduced Verizon's UNE rates by 7.11% to reflect the savings from mergers and process re-engineering activities.⁵¹ The RI PUC stated that, "it is entirely appropriate, for purposes of TELRIC-compliant rates...to examine Verizon's initial estimates of *forward looking* costs with those that might have been estimated after the *forward-looking* cost savings of the merger are considered."⁵²

BayRing showed before the NH PUC that using the same approach taken by the RI PUC and substituting New Hampshire specific expenses for Rhode Island specific expenses, Verizon's share of the savings from the two mergers represents a 5.06% of Verizon's annual operating expenses, including depreciation and taxes.⁵³ In addition, Verizon's share of system-wide savings from process reengineering constitutes an additional 1.37% of Verizon's operating

⁴⁹ DT 01-151, Comments by AT&T Communications of New England, Inc. in Response to Verizon-NH's Letter Dated March 15, 2002 at 5 (March 21, 2002).

⁵⁰ *Id.*, citing, Tr. of 5/21/98, at 70, 276 (Dr. Johnson).

⁵¹ *In Re: Review of Bell Atlantic-Rhode Island TELRIC Study*, Docket No. 2681, Report and Order, at 69-73, 76 (R.I. P.U.C. Nov. 18, 2001) ("*RI TELRIC Decision*")

⁵² *Id.*. The RI PUC correctly did not consider merger costs in assessing merger savings. "Merger costs" such as a special pension enhancement for "downsized" employees are backward-looking, not forward looking. A forward looking Verizon would not have had the excess employees in the first place. For example, the New York PSC in addressing the issue of special pension enhancement in the context of the recent mergers Verizon has allowed for a limited recovery of special pension enhancement costs, but in determining the amount of recovery only examined the SPE costs that occurred before the "advent of the mergers and competitive markets that tend to increase these expenses." *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case No. 98-C-1357, Order on Unbundled Network Element Rates at 75 (N.Y. P.S.C. Jan. 28, 2002) ("*NY UNE Order*")

⁵³ BayRing App. A, Tab 8, Exhibit 69. See Attachment B to Exhibit 69 for a breakdown of how the New Hampshire-specific merger savings is calculated. Verizon's operating expenses are derived from 1999 ARMIS data.

expenses, including depreciation and taxes, for a total of 6.43%.⁵⁴ The NH PUC agreed, and imposed as a condition that Verizon reduce all rates by 6.43% to account for merger and process re-engineering savings.⁵⁵ Once again, Verizon refused and the NH PUC backed off.

C. The NH PUC's Determination of UNE Rates Was Based On An Incorrect Legal Standard

The NH PUC applied the wrong legal standard in determining UNE rates. The FCC's TELRIC rules require that costs for access to UNEs be measured on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration given the existing location of ILEC wire centers.⁵⁶ In its *July 6 Order*, apparently unaware that the decision of the U.S. Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*⁵⁷ had been stayed, the NH PUC expressly stated that it was following and applying the now-reversed Eighth Circuit ruling, instead of the FCC's TELRIC rules.⁵⁸ As the NH PUC noted:

[o]ur analysis of the pricing proposals in this docket is premised on a forward-looking economic cost methodology, as set forth in the TAct and now interpreted in *Iowa III*. Thus, it is calculated to reflect the ILEC's actual incremental costs in the future to serve competitors with the ILEC's network facilities, including whatever upgrades the ILEC chooses to implement.⁵⁹

The NH PUC's focus on "actual incremental costs," "the ILEC's network facilities," and upgrades the ILEC "chooses to implement" is clearly at odds with this Commission's TELRIC methodology, which has now been upheld by the United States Supreme Court.⁶⁰ The NH PUC

⁵⁴ *Id.*.

⁵⁵ *NH PUC Conditions Letter* at 2.

⁵⁶ 47 C.F.R. 51.505(b)(1).

⁵⁷ *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. July 18, 2000), *rev'd*, *Verizon v. FCC*, 122 S.Ct. 1646 (2002).

⁵⁸ *Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996*, Order Granting In Part and Denying in Part, Order No. 23,738 at 5-6, 57-59, 85-88 (July 6, 2001) ("*July 6th Order*"). A copy of this order is found at VZ App. I-NH, Vol. 1, Tab 3.

⁵⁹ *July 6th Order* at 5-6.

⁶⁰ *Verizon v. FCC*, 122 S.Ct. 1646 (2002).

should have looked instead at the forward-looking incremental costs of a hypothetical network using the most efficient telecommunications technology currently available and using the lowest cost network configuration. Instead, the NH PUC was examining the ILEC's actual network and the upgrades the ILEC chooses to deploy. The effects of NH PUC's application of the Eighth Circuit's methodology permeate the NH PUC's *July 6th Order*. For instance, in regard to nonrecurring costs, the NH PUC rejected AT&T's model, noting that "with the reasoning of the *Iowa III* in mind, we are convinced by Staff and Bell Atlantic arguments. . . ." ⁶¹ The NH PUC noted that the Eighth Circuit rejected the "FCC's use within that [TELRIC] methodology of what the Eighth Circuit terms a hypothetical network." ⁶² Thus, the NH PUC focused only on those costs that it felt an ILEC "actually incurs or will incur" in providing the network element. ⁶³ Similarly in regard to choice of recurring cost models, the NH PUC stated "*Iowa III* rejects AT&T's basic assumption that a TELRIC-compliant model must utilize the most advanced technology in existence." ⁶⁴ The NH PUC opted for the Telecom Model its Staff had commissioned from the consulting firm Ben Johnson Associates, Inc. because the Telecom Model produced outputs that withstand comparisons to the "existing network." ⁶⁵

BayRing and Network Plus filed for reconsideration of the *July 6th Order*, as did AT&T, noting that the NH PUC's approach was in error because the Eighth Circuit had stayed the portion of its opinion that the NH PUC relied upon. The NH PUC in its *Order on Reconsideration* noted that its determination of what constituted "just and reasonable rates was premised in part on the notion that "a reasonable approach to modeling a forward-looking

⁶¹ *July 6th Order* at 63.

⁶² *July 6th Order* at 63.

⁶³ *July 6th Order* at 63.

⁶⁴ *July 6th Order* at 93.

network requires some relationship to the reality of the current network world.”⁶⁶ Thus, the NH PUC was clearly still adhering to the Eighth Circuit approach, which has now been unequivocally invalidated by the Supreme Court, and did not make any modifications to Verizon’s rates to reflect the fact that it had relied upon the wrong methodology.

D. Verizon’s Loop Rates Are Based On Incorrect Inputs

In determining loop costs, the NH PUC ignored Verizon’s loop cost model and instead opted for a cost model developed by an outside consultant hired by its Staff. This Telecom cost model generated by the consultant produced statewide average loop rates 17.8% *higher than even Verizon’s own model*.⁶⁷ The NH PUC failed to consider un rebutted evidence of how this third party cost model overestimates the forward-looking cost of outside plant.⁶⁸ For instance, Dr. Johnson’s Telecom Model assumes use of an inefficient and unduly costly “star” design of feeder plant instead of using the “pine tree” design that outside plant engineers in fact use to serve all customer locations with the least overall amount of outside plant possible. The “star” design results in unnecessary, parallel feeder lines that needlessly increase the assumed quantity of outside plant, and results in far more distribution area nodes than are necessary. This leads to excessive use of expensive digital electronics in remote terminals at the distribution area nodes.⁶⁹ Dr. Johnson conceded this shortcoming in his study and there was no indication that an engineer “ever examined the algorithms underlying his model to ensure that they accurately model the most efficient outside plant layout, or the inputs to this model to ensure that they appropriately

⁶⁵ *July 6th Order* at 93.

⁶⁶ Docket DE 97-171, Order No. 23,847 at 14 (Nov. 21, 2001) (“*Nov. 21st Order*”). A copy of this order is found at VZ App. I-NH, Vol. 1, Tab 4.

⁶⁷ *See Nov. 21st Order* at 6-7 (Nov. 21, 2001). A copy of this order is found at VZ App. I-NH, Vol. 1, Tab 4.

⁶⁸ DT 01-151, Brief of AT&T and AT&T Broadband at 1 (Jan. 30, 2002), *citing*, Docket No. DE 97-171, 9/3/98 Tr. at 134-139 (Wells). *See* VZ App. B-NH, Vol. 6, Tab 20.

⁶⁹ *Id.*

modeled use of forward-looking technology.”⁷⁰ It is little mystery then how loop rates became so inflated in New Hampshire.

E. Verizon’s Loop, Transport, and Dark Fiber Rates Lead To An Overrecovery of Verizon’s Costs

Verizon double recovers capital costs through its loop and dark fiber charges. As established in the January 17th hearing before the NH PUC in Docket No. DT 01-206, Verizon is (1) currently recovering the same capital costs for loop fiber both through its loop charges and its dark fiber loop charges and (2) currently recovering the same capital costs for interoffice fiber both through its interoffice transport charges and its dark fiber transport charges.

For instance, as recognized by the NH PUC’s Facilitator at the January 17, 2002 hearing in DT 01-206, if a cable has 24 strands, 16 of which are in use as lit fiber (transport or loops) (using for purposes of this example a 66.67% fill factors), the capital cost of the 8 dark fiber strands is fully recovered in prices for UNE loops or transport. If Verizon then sells 2 of the dark fiber strands, using its proposed 80% fill factor for dark fiber, it would be recovering the capital cost of 2.5 additional strands, for a total recovery of $24+2.5=26.5$ strands, while paying for only 24 strands.⁷¹ The recovery of costs for 26.5 strands when only 24 strands of costs are incurred is an overrecovery. To avoid this overrecovery, it is necessary either (1) to reduce rates for dark fiber or (2) to reduce rates for loops and transport, or (3) some combination of (1) and (2).

⁷⁰ DT 01-151, Brief of AT&T and AT&T Broadband at 1 (Jan. 30, 2002), *citing*, Docket DE 97-171, Ex. 70, Johnson Track 2 Direct at 73, lines 4-11 (May 8, 1998); Docket DE 97-171, 5/21/98 Tr. at 41 (Johnson); Docket DE 97-171, Ex. 23, Johnson Track 1 Direct, Appendix A.

⁷¹ DT 01-206, *Verizon New Hampshire UNE Remand Tariffs*, January 17, 2002 Transcript at 79: 1-10 (“DT 01-206, Jan. 17, 2002 Tr.”). A copy of the transcript is found at VZ App. D-NH, Vol. 1, Tab 6.

F. Verizon's Rates Are Higher Than Comparable Rates In the Region

To further demonstrate the non-forward looking nature of Verizon's rates, Verizon's UNE loop rates are excessive, as illustrated below, when compared to Vermont UNE loop rates and those in other adjoining and comparative states in the Verizon footprint. In fact, Verizon's UNE loop rates, as a general matter, greatly exceed the UNE loop rates of the other sampled Verizon states.

Zones	NH	VT	NY ⁷²	MA ⁷³	PA	RI	NJ
1	\$11.97	\$7.72	\$7.70	\$7.54	\$10.25	\$11.19	\$8.12
2	\$16.04	\$8.35	\$11.31	\$14.11	\$11.00	\$15.44	\$9.59
3	\$25.00	\$21.63	\$15.51	\$16.12	\$14.00	\$19.13	\$10.92
4				\$20.04	\$16.75		

As the above comparison table illustrates, Verizon's UNE loop rates are far from being reasonable or forward looking by any standard. Tellingly, Verizon's UNE loop rates for zones 1, 2, and 3 rates are 55%, 92% and 16% higher than the UNE loop rates ordered by the neighboring Vermont Public Service Board and 47%, 67%, and 229% higher than the UNE loop rates recently ordered by the New Jersey BPU, respectively. Verizon's rates are 55%, 41% and 61% higher than the New York loop rates. Verizon's UNE loop rates in zones 1 and 2 are 59% and 14% higher than the Massachusetts rates, 17% and 46% higher than the Pennsylvania rates, respectively. As a result, it is abundantly clear through these comparisons that Verizon UNE

⁷² Connecticut, in which Verizon has only two exchanges, has followed New York's rates. To our knowledge, the Connecticut DPUC has not yet decided whether to adopt the newly revised New York rates.

⁷³ The Massachusetts Department of Telecommunications and Energy issued a decision on July 12, 2002 in Docket 01-20 that will revise Massachusetts's loop rates. While we believe that they will be decreased as a result of this decision, the extent of the decrease will not be determined until Verizon's compliance filing has been made and approved by the DTE.

loop rates are excessive and demonstrate that Verizon's rates are not at all reasonable and are not truly forward looking as the Act and the FCC require.

G. Benchmark Analysis

To determine whether rates are "outside the range that the reasonable application of TELRIC principles would produce," the Commission undertakes comparisons of rates in the applicant's state to rates it has previously found to be TELRIC-compliant in another state.⁷⁴ The Commission determined that a comparison is permitted when there is a: 1) common BOC; 2) geographic similarities; 3) generally similar rate structures; and 4) the rates in the comparison state have already been found to be reasonable.⁷⁵ In evaluating the rates, the FCC will look to see if the rate differential between the states is based on different costs between the states. If not, there is a strong indication that the rates are not TELRIC-based.⁷⁶

The most appropriate state for comparison purposes is Vermont. It satisfies all four criteria the FCC uses for comparative purposes. The two states share a common RBOC and similar rate structure. In fact, Verizon's operations in New Hampshire and Vermont are vestiges of Verizon's New England Telephone operations.⁷⁷ Verizon's Vermont rates have been found to be TELRIC-compliant by the Vermont Public Service Board and this Commission.⁷⁸ Most importantly, Vermont is much more similar geographically to New Hampshire than is New York. More than half the population of New York State is concentrated in the New York City

⁷⁴ *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, ¶ 81 (Jan. 22, 2001) ("Kansas/Oklahoma 271 Order").

⁷⁵ *Pennsylvania 271 Order*, at ¶ 63.

⁷⁶ *Pennsylvania 271 Order*, at ¶ 84.

⁷⁷ In New York, Verizon's operations are a vestige of its New York Telephone operations.

⁷⁸ *Vermont 271 Order* at ¶ 18.

metropolitan area. There is certainly no city in New Hampshire that is similar to New York City.

The loop costs in Vermont, per the USF model, are **[BEGIN PROPRIETARY]** XXX **[END PROPRIETARY]** *higher* than in New Hampshire, but Vermont loop rates are 12% *lower* than in New Hampshire. Thus, the higher rates in New Hampshire are clearly not explained by the cost differential since the cost differential would argue for much lower loop rates in New Hampshire than in Vermont. The benchmark analysis demonstrates that Verizon's loop rates are not TELRIC-compliant. Verizon needs to reduce loop rates substantially to demonstrate that the New Hampshire rates are TELRIC-compliant.

H. Verizon's Rates Are Temporary and Provide No Certainty to CLECs

Verizon's filing implies that all the UNE rates in New Hampshire are final and permanent.⁷⁹ The reality is that many of the rates in New Hampshire are far from permanent, including the "voluntary" rate reductions Verizon made to come into compliance with the Checklist. In fact, the ink is not even dry on the rate reductions before a new proceeding has been initiated to address cost of capital issues and other cost input variables.⁸⁰ As the Chairman of the Telecommunications Oversight Committee of the New Hampshire legislature noted in a letter to the NH PUC Commissioners, the rates are "considered temporary in nature as the commission may open a full rate investigation under RSA 378 immediately on receipt of FCC approval."⁸¹ Thus, the very limited rate reductions agreed to by Verizon are expressly

⁷⁹ See Hickey/Garzillo/Anglin Declaration at ¶ 26 ("The rates resulting from this order [in DT 01-206] took effect immediately upon that order's release"); *Id.* at ¶ 29 (Verizon's voluntary rate reductions "became effective on June 14, 2002").

⁸⁰ See Hickey/Garzillo/Anglin Declaration at ¶ 30.

⁸¹ May 20th Legislature Letter at 1.

contemplated as a band-aid to Verizon's application that will be subject to possible removal once Verizon obtains Section 271 authority.

BayRing understands that ratesetting is an on-going process and state commissions will periodically revisit their decisions. When, however, as is the case here, permanent TELRIC-compliant rates have not been established, and rate reductions are considered necessary to bring the rates into conformance with the competitive checklist, the "temporary" nature of the rates is very problematic. Verizon's application puts the cart before the horse. Permanent, pro-competitive TELRIC rates should have been established first, and then Verizon should have made its application. Verizon filed this application even before the rates set in the NH PUC's *UNE Remand* docket (DT 01-206) became effective.⁸²

This Commission has held that in order to gain in-region, interLATA entry, a BOC must "support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior."⁸³ For a substantial portion of the UNE rates in New Hampshire, there is no evidence of present compliance with statutory conditions for entry. Given the temporary nature of Verizon's rate reductions, the prospective evidence suggests that any compliance with the Commission's 271 pricing requirements may be fleeting. Verizon's "approve us now and we will fix the rates later" is a "ruse" to obtain Section 271 approval without first fixing its UNE

⁸² Indeed, even as of today, the NH PUC has yet to formally approve Verizon's compliance filing in that docket. The rates involved include, *inter alia*, rates for loop conditioning, line sharing, dark fiber, and UNE combinations. Moreover, the rates for loop conditioning remain in flux because Verizon has failed to file a proposal for conditioning of multiple pairs as the NH PUC ordered in DT 01-206. Verizon has requested an extension on the time frame to file this proposal because Verizon discovered when it reviewed its initial draft of the study it prepared for multiple loop conditioning that "not all of the Commission-mandated requirements were reflected in the analyses." BayRing App. A, Tab 20, Docket DT 01-206, July 3, 2002 Letter from Victor D. Del Vecchio, Senior Regulatory Counsel, Verizon to Debra Howland, New Hampshire Public Utilities Commission.

⁸³ *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the*

rates. If the Commission allows Verizon's approach, it creates a dangerous precedent in which a Section 271 applicant will merely have to float the notion of a future rate proceeding as remedy to deficiencies in its rates.

The Commission addressed the issue of interim rates in its *BANY 271 Order* and created a limited exception for use of interim rates. The Commission noted:

[w]e believe that this question should be addressed on a case-by-case basis. If the uncertainty caused by the use of interim rates can be minimized, then it may be appropriate, at least for the time being, to approve an application based on the interim rates contained in the relevant tariff. Uncertainty will be minimized if the interim rates are for a few isolated ancillary items, permanent rates that have been established are in compliance with our rules, and the state has made reasonable efforts to set interim rates in accordance with the Act and the Commission's rules.⁸⁴

The presence of temporary rates and the fact that whatever permanent rates there are based on flawed inputs and application of an inappropriate pricing methodology creates much uncertainty for competitors. The already bleak prospects for competition caused by the price squeeze, discussed further below, coupled with this uncertainty will impede, if not preclude, competitive entry.

The NH PUC would not have asked Verizon to make across-the-board reductions in rates if it felt that its pricing methodology was truly in conformance with the FCC's pricing principles. Verizon's failure to make these concessions means that it continues to remain in non-compliance. The fact that whatever reductions it did make are "temporary" demonstrate that

Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, FCC 00-238 at ¶ 67 (June 30, 2000) ("*SBC TX 271 Order*")

⁸⁴ *BANY 271 Order* at ¶ 258.

there is also little hope of future compliance with Checklist Item 2 particularly since Verizon will have no incentive to make any future concessions once it obtains Section 271 authority.⁸⁵

I. Verizon's Continued Challenge of the Collocation Power Rate Established by the NH PUC Precludes a Finding of Checklist Compliance

Another area in which rates are not final and still very much uncertain is in regard to collocation power.⁸⁶ Verizon's DC power rate was recently deemed excessive by the Commission and based in part on an installation factor that was "on its face....improbable and unreasonable."⁸⁷ In contrast to Verizon's rate of \$19.65 (over 60 amps) or \$20.39 (60 amps or fewer), the rate found reasonable by the Commission was \$3.53 (over 60 amps) or \$3.71 (60 amps or fewer) for the urban zone; \$3.99 (over 60 amps) or \$4.18 (60 amps or fewer) for the suburban zone; and \$6.13 (over 60 amps) or \$6.32 (60 amps or fewer) for the rural zone.⁸⁸

There is still tremendous uncertainty as to collocation power rates given Verizon's attempts to take multiple bites at the apple until the Commission establishes collocation power pricing rates that are pleasing to Verizon. In its July SGAT Order, the Commission determined that there was no incremental cost that Verizon could charge for DC Power.⁸⁹ This finding was based on the Commission's determination that Verizon had not shown that additional power

⁸⁵ One issue that will need to be determined is if Verizon will continue to apply its rate reductions to the newly-determined TELRIC rates. The NH PUC determined that not only did Verizon's rates need to be updated and lowered but that it needed to ensure that the new rates would alleviate the price squeeze. Thus, it may not be enough that new TELRIC rates are established, but they may also need a further percentage reduction to rectify the price squeeze. For instance, the new DS-1 loop rate may still need the 20% to reduction to enable competitors to achieve a positive gross margin. Until these issues are resolved the Commission cannot determine if the markets in New Hampshire, even if open to competition now, will remain open to competition. This is all the more reason why it is vital to have final rates such that the Commission can accurately evaluate not only the present state of competition, but the prospects for future competition.

⁸⁶ Verizon fails to disclose in its application that it has appealed the collocation power rate.

⁸⁷ *Nov. 21th Order* at 36.

⁸⁸ Docket DT 97-171, *Order Addressing Motion for Reconsideration of Order No. 23,847*, Order No. 23,915 at 13 (Feb. 4, 2002). A copy of this order is found at VZ App. I-NH, Vol. 1, Tab 6.

⁸⁹ *July 6th Order* at 118.

equipment must be installed in order to meet CLEC needs.⁹⁰ The Commission then considered the issue once more in response to Verizon's August 3, 2001 Motion for Rehearing. While allowing for the recovery of DC power costs, the Commission adjusted Verizon's proposed costs to make them TELRIC-compliant.⁹¹ Still not satisfied with the results, Verizon filed yet another motion for reconsideration seeking a third bite at the apple in its attempt to impose unreasonable rates for DC power in collocation sites. When that attempt was largely unsuccessful, Verizon then appealed the Commission's order to the New Hampshire Supreme Court.⁹²

Until the appeal is resolved, the collocation power rates will, in effect, be interim, leaving CLECs with a tremendous amount of uncertainty as to what the ultimate rates will be. Collocation power rates play a big role in determining the viability of serving particular customers. Prior to the Commission setting the per amp rate ranging from \$3.53 to \$6.32, Verizon was charging CLECs \$19.65 per amp. This translated into charges of roughly \$6,000 per month for power for a single small collocation space.⁹³ Thus, unless CLECs can have certainty that just and reasonable collocation power charges are in place they will be inhibited in providing service to particular customers. In New Jersey, the NJ BPU "noted that a Verizon challenge of the validity or effective date of the rates or any attempt to increase or otherwise change these rates, will call into question whether the modified rates would be TELRIC compliant, and, therefore, also call into question the Board's finding of compliance with Checklist Item 2."⁹⁴ The NH PUC has determined a TELRIC-compliant collocation power rate.

⁹⁰ *Id.*

⁹¹ *Nov. 21th Order* at 35-38

⁹² Case No. 2002-0140 (NH Sup. Ct.).

⁹³ BayRing App. A, Tab 5, Docket No. DT 01-151, Reply Declaration of BayRing Communications at ¶ 2 (Nov. 27, 2001).

⁹⁴ BayRing App. A, Tab 17, Letter from Henry M. Ogden, Acting Secretary, New Jersey Board of Public Utilities to Bruce D. Cohen, Esquire, Verizon New Jersey (Jan. 9, 2002).

As long as Verizon continues to challenge this determination there can be no finding that

Verizon is in compliance with Checklist Item 2.

III. NON-COST ISSUES

A. Verizon's Dark Fiber Terms Are Unreasonable and Discriminatory (Competitive Checklist Items 2 (Non-Discrimination), 4 (Local Loops) and 5 (Local Transport))

Section 271(c)(2)(B)(ii) requires a BOC seeking in-region interLATA authority to offer “nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).”⁹⁵ Section 251(c)(3), in turn, requires incumbent LECs “to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, *reasonable*, and *nondiscriminatory*.”⁹⁶

While claiming that it provides dark fiber in New Hampshire, Verizon admits that it has only received a total of 397 dark fiber orders in *all of the New England states combined*,⁹⁷ and provides no information about the extent to which any of these dark fiber orders were in New Hampshire. In fact, the record before the NH PUC reflects that few dark fiber orders were received in New Hampshire because prior to placing an order, a CLEC must first inquire whether there is fiber available and Verizon has responded to a staggering 84% of dark fiber inquiries by claiming that there is no dark fiber available.⁹⁸

⁹⁵ 47 U.S.C. § 271(c)(2)(B)(ii).

⁹⁶ 47 U.S.C. § 251(c)(3) (emphasis added).

⁹⁷ Verizon Brief at 54-55.

⁹⁸ Dec. 10, 2001 Tr. at 112:15-113:10. A copy of the December 10th transcript is found at VZ App. B-NH, Vol. 5, Tab 13.; *see* BayRing App. A, Tab 4, Exhibit 37 at ¶ 47; JC 1-75.

Verizon's terms, conditions and practices in New Hampshire regarding, *inter alia*, the amount of dark fiber considered part of the inventory available to CLECs, its network planning process, its reservation of fiber for maintenance purposes and its reservation of dark fiber for future growth are unreasonable, and therefore violate the Act, because as a practical matter, they provide Verizon with unlimited discretion to limit severely the quantity of dark fiber and routes that are deemed by Verizon to be available to CLECs.⁹⁹ In fact, Verizon's unreasonable terms regarding dark fiber may explain the phenomenal rejection rate of 84% of dark fiber inquiries experienced by CLECs in New Hampshire as compared to the rejection rate of 35% of dark fiber inquiries experienced by CLECs in Massachusetts.¹⁰⁰

1. Verizon's Refusal to Include in its Inventory Dark Fiber that is Not Currently Terminated at Both Ends Results in a Gross Understatement of the Amount of Dark Fiber Available to CLECs in New Hampshire

Before the NH PUC, Verizon claimed that Verizon and "its affiliates have no advantage over [CLECs] regarding the availability or provisioning of [dark] fiber."¹⁰¹ Contrary to Verizon's assertion, Verizon's policies regarding the inventory of dark fiber that is available to CLECs are discriminatory and effectively result in less fiber available to CLECs as a practical matter. Verizon will not make dark fiber available to CLECs where the fiber is located in a cable vault, manhole, or other location outside the Verizon wire center and is not terminated at both ends of the route.¹⁰² Further, Verizon admitted that when it constructs and installs fiber routes,

⁹⁹ BayRing App. A, Tab 4, Exhibit 37 at ¶¶ 47-55; BayRing App. A, Tab 5, Exhibit 39 at ¶¶ 34-43; BayRing App. A, Tab 2, Exhibit 34 at ¶¶ 9-12.

¹⁰⁰ Exhibit 54. A copy of Exhibit 54 is found at VZ App.B-NH, Vol. 6, Tab 14.

¹⁰¹ DT 01-151, Verizon Supplemental Checklist Declaration ("*Verizon Supplemental Checklist Declaration*") at ¶ 109. A copy of this document is found at VZ App. B-NH, Vol. 4, Tab 6.

¹⁰² BayRing App. A, Tab 2, Exhibit 34 at ¶ 15; Verizon's Proposed Interconnection Agreement which is attached to Exhibit 34 as Attachment CTC-05, §§ 8.5.2, and 8.5.5 ("Unused fibers located in a cable vault or a controlled environmental vault, manhole or other location outside the Verizon Wire Center, and not terminated to a fiber patch, are not available to CLEC.").

the fiber is not inventoried and is not available to CLECs until the route is completely spliced from end to end and terminated at terminals at each end, which could take as much as a year.¹⁰³ These practices result in Verizon grossly understating the amount of dark fiber in New Hampshire that should be characterized by Verizon as “available” to requesting CLECs as unbundled network elements. Such fiber may readily be made usable by Verizon as “lit” fiber for provision of services to customers, and should be considered usable by CLECs. In fact, Verizon admitted that Verizon’s planners and outside plant engineers would typically know that spare fibers that were not in the official Verizon inventory, for example, because they were not yet terminated and were still considered partially under construction by Verizon, could readily be made “available” and brought online to serve customers.¹⁰⁴ These spare fibers would effectively be available to Verizon to fill orders; however, a CLEC would be informed that “dark fiber is not available” along the requested route.¹⁰⁵ In short, the CLEC would not be informed of the imminent availability of fiber in response to its inquiry; whereas, Verizon would have full knowledge and the ability to allocate this fiber to customers.¹⁰⁶ This practice is clearly discriminatory and violates Section 251(c)(3) of the Act.

Additionally, Verizon admitted that it has never terminated fiber at the request of a CLEC in order to provide dark fiber to the CLEC.¹⁰⁷ In fact, Verizon considers fiber that is not terminated at both ends to be “under construction” and not part of the dark fiber inventory available to CLECs.¹⁰⁸ In Verizon’s Catch-22 type process, however, once the fiber is

¹⁰³ Dec. 10, 2001 Tr. at 110:1-22; Dec. 10, 2001 Tr. at 128:23-129:4.

¹⁰⁴ Dec. 10, 2001 Tr. at 110:11-111:22.

¹⁰⁵ Dec. 10, 2001 Tr. at 110:11-22.

¹⁰⁶ Dec. 10, 2001 Tr. at 237:18-238:7.

¹⁰⁷ Dec. 10, 2001 Tr. at 155:9-17.

¹⁰⁸ Dec. 10, 2001 Tr. at 153:17-154:3.

terminated, which is one of the last steps in the construction process, the new fiber capacity is quickly deemed “lit” fiber assigned to fill orders for services to Verizon’s customers. This transformation occurs as a matter of course because under Verizon’s planning processes CLEC dark fiber demand is ignored, insufficient additional capacity is therefore added in the first instance, and fiber is never terminated to provide CLEC dark fiber. Verizon’s network planning processes thus ensure that, going forward, Verizon can claim that there is little dark fiber available in the official dark fiber inventory, while consistently meeting its own demand to fill orders for its own customers.¹⁰⁹

Moreover, while such dark fiber could be available to Verizon, Verizon does not count fiber that is not terminated at both ends in calculating how much dark fiber it may reserve for maintenance and other purposes, resulting in excessive quantities of “reserved” fibers that are available to Verizon with little effort but not available to CLECs.

2. Verizon Exploits Its Policies Regarding Reservation of Dark Fiber to Hoard Dark Fiber

In addition to its policies regarding the inventory of dark fiber available to CLECs, Verizon’s policies in New Hampshire regarding reservation of dark fiber severely limit the quantity of dark fiber that is characterized as “spare” and “available” to CLECs in New Hampshire as compared to Massachusetts. In Massachusetts, Verizon will not reserve fiber pairs for unknown and unspecified future growth and, in fact, will not reserve fiber pairs unless such fibers have been “installed or allocated to serve a particular customer in the near future.”¹¹⁰ In Massachusetts, Verizon must “clearly document” any decision to reserve dark fiber and cannot reserve dark fiber for “general future growth,” or “even for a particular customer’s potential

¹⁰⁹ Dec. 10, 2001 Tr. at 167, 171.

¹¹⁰ BayRing App. A, Tab 4, Exhibit 37 at ¶ 51; Mass. Service Description, at ¶ 1.7; Mass. DTE No. 17, § 17.4.1.A.

long-term growth.”¹¹¹ Further, Verizon provides documentation in Massachusetts supporting any assertion by Verizon that spare dark fiber is not available for lease as an unbundled network element.¹¹² By contrast, in New Hampshire, Verizon maintains nearly unbridled discretion to assert that dark fiber is not “available” to CLECs as an unbundled network element, and Verizon will not agree to support any such assertion by providing relevant documentation to CLECs.¹¹³

In fact, Verizon admits that it assigns “fiber optic strands for new fiber optic systems to serve near term *aggregate* customer growth.”¹¹⁴ Under this policy, Verizon is able to hoard dark fiber by vaguely asserting that the dark fiber is reserved for “near term aggregate growth,” which is not defined anywhere, as contrasted with the Massachusetts practice of limiting reservation of dark fiber to situations where a specific customer request can be demonstrated.¹¹⁵

Indeed, if a new industrial park were constructed, under Verizon’s New Hampshire reservations policy, Verizon could reserve all the dark fiber going to the industrial park for future *aggregate* customer demand even though it has not received a single specific request from a potential customer for fiber. Moreover, under Verizon’s New Hampshire dark fiber reservation policy, the phrase “near term” is undefined and could mean anything. Accordingly, Verizon’s reservations policy enables it to hoard dark fiber and explains the phenomenal 84% rejection rate experienced by CLECs. This astonishing rejection rate raises an obvious presumption that

¹¹¹ *New England Telephone and Telegraph Company d/b/a NYNEX, Decision D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94* Phase 3, at 50 (Mass. DTE Dec. 4, 1996).

¹¹² BayRing App. A, Tab 4, Exhibit 37 at ¶ 51; Mass. Service Description, at ¶ 1.8; *see*, Mass. DTE No. 17, § 17.4.2.A.1.

¹¹³ BayRing App. A, Tab 4, Exhibit 37 at ¶ 51; *See, e.g.*, Verizon’s Proposed Interconnection Agreement, § 8.5.11.

¹¹⁴ *Verizon Supplemental Checklist Declaration* at ¶ 106 (emphasis added); BayRing App. A, Tab 5, Exhibit 39 at ¶ 41.

¹¹⁵ BayRing App. A, Tab 5, Exhibit 39 at ¶ 41.

Verizon is systematically preventing CLECs from accessing its dark fiber by exploiting its reservation, network planning and inventory policies to hoard dark fiber.

The 84% rejection rate for CLEC dark fiber inquiries is especially troubling in light of the fact that Verizon has proposed that its forward-looking utilization factor for dark fiber is approximately 50%.¹¹⁶ Verizon's representation in its cost study that 50% of its dark fiber, at a minimum, is not being utilized, is wholly inconsistent with the fact that dark fiber is rarely available to CLECs in New Hampshire. Verizon has failed to explain the disparity between its 50% fill factor and its 84% rejection rate for CLEC dark fiber inquiries. As the Commission has stated, Verizon "retains at all times the ultimate burden of proof that its [Section 271] application is sufficient."¹¹⁷ Verizon has not met its burden to demonstrate that its dark fiber inventory practices and other policies discussed below comport with the Section 271 Competitive Checklist and its obligations under Section 251(c)(3) of the Act.¹¹⁸

¹¹⁶ DT 01-206, *Verizon New Hampshire UNE Remand Tariffs*, Dark Fiber Workpapers, Workpaper 1.1, Part E. A copy of Verizon's cost studies is found at VA App. M-NH, Vol. 6a-6b, Tab 13b; BayRing App. A, Tab 2, Exhibit 34, at ¶ 15; Dec. 10, 2001 Tr. at 115:6-21& Exhibit 55 ("a 53.56 percent fill factor"). A copy of Exhibit 55 (Verizon Response to Joint CLEC Data Request JC-VZ-14 in DT 01-206) is found at VZ App. D-NH, Vol. 1, Tab No. 1.

¹¹⁷ See Application of BellSouth Corporation, *et al.*, Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, *Memorandum Opinion and Order*, FCC 97-418, 13 FCC Rcd 539, at ¶ 37 (1997) ("*BellSouth Order*").

¹¹⁸ Verizon may contend that the NH PUC's "fast track" arbitration process provides adequate protection against abusive rejection of dark fiber inquiries by Verizon. However, the NH PUC undoubtedly did not envision that 84% of all CLEC dark fiber inquiries would be rejected such that CLECs would be forced to invoke the fast track arbitration process with respect to nearly every order. BayRing App. A, Tab 5, Exhibit 39 at ¶ 38-39; BayRing App. A, Tab 4, Exhibit 37 at ¶ 49. The fast track arbitration process is designed to resolve occasional dark fiber disputes; however, Verizon has undermined the usefulness of this process by claiming unavailability in 84% of the instances in which CLECs inquired about the availability of dark fiber. The process is simply not an efficient mechanism for dealing with the enormous number of rejections interposed by Verizon.

Most significantly, the "fast track" arbitration process has proven to be anything but "fast." In the one case in which a fast track arbitration was requested, the request was filed with the NH PUC on February 13, 2002, and the case was settled four months later, after Verizon had filed testimony, but before the scheduled evidentiary hearing had been held. DT 02-028, *CTC Communications Corp., Request for Fast Track Arbitration of Verizon's Denial of Dark Fiber Request*.

In sum, Verizon's current dark fiber terms, conditions, and practices in New Hampshire are unreasonable, and therefore violate the Act, because as a practical matter they provide Verizon with unbridled discretion to limit the quantity of dark fiber routes available to CLECs and reject 84% of all CLEC inquiries.

B. Verizon Does Not Provide Adequate Access to High Capacity UNE Loops and Transport (Competitive Checklist Items 2 (Non-Discrimination), 4 (Local Loops), and 5 (Local Transport))

Section 271(c)(2)(B)(ii) of the Act requires a BOC seeking in-region interLATA authority to offer "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."¹¹⁹ Section 251(c)(3), in turn, requires ILECs "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In addition, the *BA/GTE Merger Order* directs the combined Verizon to adopt the best practices of the two merging entities.¹²⁰ Verizon has not demonstrated compliance with these requirements. In fact, the record shows that Verizon has established anti-competitive, discriminatory policies with respect to provisioning of high capacity loops and transport designed to relegate CLECs and their customers to inferior networks and artificially foist higher cost facilities on its competitors.

In evaluating Verizon's performance for specific loop types such as DS-1 loops, the Commission must consider patterns of systemic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to

¹¹⁹ 47 U.S.C. § 271(c)(2)(B)(ii) ("Checklist Item II").

¹²⁰ *BA/GTE Merger Order*, at ¶¶ 8, 14.

competes.¹²¹ CLECs use DS-1 and DS-3 UNEs to reach small to mid-sized business in order to provision affordable, competitive broadband service options. These facilities are often deployed by CLECs in areas that cannot be reached by xDSL services because of their distance from a central office or because the existence of a Digital Loop Carrier (“DLC”) system impedes the deployment of xDSL. In such cases, a four-wire DS-1 loop allows a CLEC to expand its serviceable customer base by reaching those customers that cannot be served by xDSL. This DS-1 high capacity loop provides the only cost effective option for many CLECs to reach these otherwise unattainable customers and is an integral part of their business plans. It is BayRing’s experience that there is rarely, if ever, an alternative high capacity facility available to serve small to medium sized businesses.¹²² In addition, it is neither practical nor cost-effective to build such “last mile” facilities to each customer they serve.

DS-1 circuits can also be used to provide unbundled local transport. Section 271(c)(2)(B)(v) of the competitive checklist requires an RBOC to provide “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.”¹²³ The Commission has required that RBOCs provide both dedicated and shared transport to requesting carriers.¹²⁴ The Commission has also required that the ILEC must provide all technically feasible capacity related transmission services, including DS-1

¹²¹ See *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734, at 6 (rel. March 23, 2001)(encouraging BOC-applicants to explain why factual anomalies may have no meaningful adverse impact on a competing carrier’s ability to obtain and serve customers); *Massachusetts 271 Order*, at ¶ 122

¹²² Dec. 7, 2001 Tr. at 28:9-15. A copy of the December 7th transcript is found at VZ App. B-NH, Vol. 5, Tab 11.

¹²³ 47 U.S.C. § 271(c)(2)(B)(v).

¹²⁴ *Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, ¶ 201 (1998) (“*Louisiana 271 Order*”).

transport.¹²⁵ Accordingly, in order for Verizon to meet its burden of proof that it has complied with its obligations under Checklist Items 2, 4, and 5, Verizon must demonstrate that it provides non-discriminatory access to high-capacity loops and transport. Verizon has not met its burden in this case.

1. Verizon's High Capacity Facility Provisioning Discriminates Against CLECs and Does Not Comply with the Act

The record contains evidence concerning Verizon's implementation of a "no facilities" policy that has resulted in an increasing number of CLEC requests for high capacity (*i.e.*, DS1 and DS3) facilities.¹²⁶ Under this new Verizon policy, it will reject a CLEC request for high capacity loops or transport on a "no facilities available" basis in circumstances where all of the equipment necessary to provide the loop is not in place,¹²⁷ as well as where the actual loop or transport facilities requested are not available. Verizon's new policy essentially expands the definition of "facility" to include not only the loop or transport facility itself (*i.e.*, the copper or fiber), but also any of the electronics or other equipment necessary to utilize the facility. Verizon does not treat its retail customers in a similar manner; its retail customers' requests are not rejected for lack of facilities. Given the importance of high-capacity facilities for the provisioning of new and innovative advanced services, high-speed data transport and Internet access, and other broadband services, Verizon's discriminatory conduct has an even greater adverse effect on competition. This Commission should not acquiesce in Verizon's undisguised efforts to reduce competition.

¹²⁵ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, ¶ 308 (1999) ("UNE Remand Order"), remanded, *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

¹²⁶ BayRing App. A, Tab 4, Exhibit 37 at ¶¶ 56-60; BayRing App. A, Tab 3, Exhibit 35 at ¶¶ 12-22.

¹²⁷ At the hearing, Verizon noted several examples of electronics that, if not already installed on a high capacity loop, would render that loop unavailable to CLECs, including multiplexers, apparatus cases, repeaters and

Before the NH PUC, Verizon's response to the evidence concerning Verizon's discriminatory policy was to downplay the significance of this conduct by claiming that discrimination in this context is not disqualifying because it only affects a small percentage of unbundled loops in service.¹²⁸ Verizon also argued that the NH PUC should ignore Verizon's discriminatory conduct because the issue is not appropriate for a 271 proceeding.¹²⁹ Finally, Verizon attempted to explain away its conduct by describing what it does in an unrelated context and citing that behavior as an example of its compliance with the Competitive Checklist.¹³⁰ Nonetheless, Verizon failed to respond to the CLECs' key complaint – Verizon does not provide CLECs access to unbundled high-capacity loops and transport in the same manner that Verizon utilizes such facilities for its own retail customers. Therefore, Verizon has not met its burden of demonstrating that it complies with Competitive Checklist Items 2, 4 and 5.

The record reflects that CLECs in New Hampshire have received an increasing number of “no facilities” rejections for their high capacity UNE requests as a result of Verizon's change in policy.¹³¹ For instance, in the months up to and including July 2001, Verizon rejected approximately 6% of Network Plus's orders for no facilities. In August 2001, Verizon rejected approximately 39% of Network Plus's orders, or more than 6 times as many, for no facilities.¹³²

line cards. Dec. 6, 2001 Tr. 220:22-223:12, 223:18-20. A copy of the December 6th transcript is found at VZ App. B-NH, Vol. 4, Tab 9.

¹²⁸ *Verizon Supplemental Checklist Declaration* at ¶¶ 67-69. In this proceeding, Verizon has similarly pointed out that these loops make up only a small percentage of all loops actually provisioned in New Hampshire. Verizon Brief at 45.

¹²⁹ *Verizon Supplemental Checklist Declaration* at ¶¶ 68-70.

¹³⁰ *Verizon Supplemental Checklist Declaration* at ¶¶ 70-80.

¹³¹ BayRing App. A, Tab 3, Exhibit 35 at ¶ 12.

¹³² *Id.*

Finally, between September 1, 2001 and December 14, 2001, Verizon rejected approximately 18% of Network Plus's high capacity orders.¹³³

Verizon did not respond to this evidence. Rather, Verizon incorrectly claimed that CLECs were asking Verizon to “dig up the streets” and “act as [a] construction compan[y]” to build facilities for CLECs.¹³⁴ On the contrary, BayRing wants nothing more than what Verizon is obligated to provide under the Act – nondiscriminatory access to high capacity loops and transport at parity with Verizon's retail operations. The issue is not whether Verizon will “dig up the streets” in order to meet a CLEC request for high capacity UNEs.¹³⁵ Rather, BayRing's complaint is that even where facilities exist, Verizon will reject a UNE request if certain equipment necessary to make the circuit operational is not in place.

Consistent with Verizon's policy to do the minimum necessary to comply with the law with respect to CLEC access to UNEs, Verizon stated that it will install certain equipment on high capacity loops in order to permit a CLEC to utilize the facility.¹³⁶ For instance, Verizon stated that it will install high capacity line cards and install cross connects, and will terminate a high capacity loop to the appropriate network interface device such as a Smart Jack or Digital

¹³³ BayRing App. A, Tab 6, Exhibit 40.

¹³⁴ *Verizon Supplemental Checklist Declaration* at ¶¶ 71, 78.

¹³⁵ BayRing does not request that Verizon should be required to construct entirely new facilities in all cases; however, the effect of Verizon's policy to reject requests for high capacity UNEs on a “no facilities” basis, while agreeing to provide higher cost special access circuits, does discriminate against those carriers that seek to utilize UNEs to provide services similar to those provided by Verizon. Regardless of the basis for Verizon's different treatment of high capacity UNEs and special access, the fact is that many CLECs cannot compete with Verizon to provide advanced services over a special access circuit because of the substantially higher cost of these facilities. In addition, because of the difficulty in converting special access circuits to enhanced extended loops (“EELs”) or other UNE combinations, and Verizon's ultimate control of a conversion matter, many CLECs are unable to convert (or are unable to take the risk of not being able to convert) these high cost facilities to more competitive UNEs. See BayRing App. A, Tab 6, Exhibit 40.

¹³⁶ *Verizon Supplemental Checklist Declaration* at ¶¶ 73, 79; Dec. 6, 2001 Tr. at 221:5-18, 223:22-224:6. A copy of the December 6th transcript is found at VZ App. B-NH, Vol. 4, Tab 9.

Cross Connect.¹³⁷ Verizon added, however, that it would not install multiplexers, apparatus cases¹³⁸ or any other electronics for CLECs, even if the CLEC agreed to pay the additional cost of such installation.¹³⁹ Verizon has not provided any valid explanation for its willingness to install certain types of equipment and its refusal to install other types of equipment.

Verizon admits that it treats its retail operations differently than it treats CLECs with respect to installation of electronics on high capacity facilities. Verizon has stated that it will not install certain types of equipment in order to make a high capacity UNE available to a CLEC, and, when it rejects a CLEC UNE request, it will not make information about an alternate route available to the CLEC.¹⁴⁰ Significantly, Verizon's conduct with respect to its own retail operations is strikingly different. Verizon admitted that it will "routinely install electronics or other equipment . . . to provide high capacity facilities to its retail customers in its network."¹⁴¹ Verizon also stated that if facilities are not available for a retail customer's preferred route, it will do whatever it can to make the requested product available to its customer.¹⁴² In short, while Verizon is rejecting increasing numbers of CLEC high capacity UNE orders, refusing to install necessary equipment to provide facilities to CLECs and foisting high cost substitute facilities on CLECs, it is doing everything necessary to provide the same facilities to its retail customers. It would be difficult to find a clearer example of discriminatory conduct.

Verizon's arguments can be boiled down to Verizon's belief that, because the specific number of high-capacity facilities actually provisioned is a small percentage of the total loops

¹³⁷ *Verizon Supplemental Checklist Declaration* at ¶ 75; Dec. 6, 2001 Tr. at 221:5-18.

¹³⁸ *Verizon Supplemental Checklist Declaration* at ¶ 79; Dec. 6, 2001 Tr. at 223:2-5.

¹³⁹ Dec. 6, 2001 Tr. at 224:11-17, .228:22-229:1.

¹⁴⁰ *Verizon Supplemental Checklist Declaration* at ¶¶ 75, 79; Dec. 6, 2001 Tr. at 220:13-17, 221:5-18, 224:11-17.

¹⁴¹ Dec. 6, 2001 Tr. at 224:18-22.

¹⁴² Dec. 6, 2001 Tr. at 217:16-218:2.

provisioned by Verizon, its discriminatory conduct designed to eliminate competitors' access to those facilities should be ignored. In other words, Verizon would have the Commission believe that Verizon is in compliance with the Checklist Obligations because it is lawfully providing most UNEs. Contrary to Verizon's spin on its Checklist obligations, Section 271 requires that Verizon provide *all* UNEs in a just and reasonable manner; partial compliance is not the basis for grant of Section 271 authorization.

Verizon's argument that a small percentage of total loops actually provisioned are high-capacity loops ignores several significant facts. First, Verizon's argument fails to address the importance of high capacity facilities in the competitive marketplace. The record demonstrates the importance of high capacity facilities to CLECs in general and to their business plans specifically.¹⁴³ The Commission has also recognized the importance of high capacity facilities to CLECs and to competition, noting that high-capacity facilities are "absolutely necessary for the ubiquitous deployment of high-speed services, including high speed internet access" and that "failing to assure access to high-capacity loops would impair [a CLEC's] ability to provide the services that they seek to offer in the broadband service markets."¹⁴⁴ In fact, Verizon's own witness conceded that there are a number of services that CLECs could provide (or could provide faster) over high-capacity facilities that they cannot provide over DS0s.¹⁴⁵ Significantly, Verizon makes use of high capacity facilities for these same purposes and to provide many of the same services. By prohibiting CLECs from obtaining access to high capacity facilities, Verizon ensures that CLECs cannot compete with it for those services. Verizon cannot hide the fact of its

¹⁴³ E.g., BayRing App. A, Tab 3, Exhibit 35 at ¶¶ 19-20.

¹⁴⁴ *UNE Remand Order*, at ¶ 187.

¹⁴⁵ Dec. 6, 2001 Tr. at 216:6-217:5.

discriminatory conduct by manipulating data to manufacture a performance ratio that disguises and understates its actual performance.

Second, Verizon's argument regarding the percentage of loops provisioned that are high capacity loops fails to acknowledge that a single high capacity loop can carry much more traffic than a voice grade (*i.e.*, DS-0) loop. In fact, Verizon admitted before the NH PUC that its 468 unbundled DS-1 High Capacity Loops in New Hampshire "represent a bandwidth capacity of up to 11,232 DS-0 loops or approximately 38.5% of the capacity of all UNE standalone loops."¹⁴⁶

Third, both the figure originally cited by Verizon and the 38.5% figure, both of which are based upon loops actually provisioned by Verizon, understate the significance of high capacity loop orders insofar as the dispute is over Verizon's *failure to provision* CLEC orders for high capacity loop orders. The percentage of high capacity loops *actually provisioned* cited by Verizon is lower than the percentage of high capacity loops *ordered* by virtue of Verizon's refusal to provision a disproportionate percentage of the orders for high capacity loops. Taking Verizon's logic to the extreme, if Verizon refused to provision *any* orders for high capacity loops, the percentage of *provisioned* loops that are high capacity would be zero, and, looking at the percentages of loops *provisioned* that were high capacity, the problem would be of no significance at all!

BayRing submits that the manufactured ratio in Verizon's Supplemental Checklist Declaration significantly understates the importance of high capacity facilities in the New Hampshire market and, as a result, the scope of Verizon's anticompetitive conduct. Thus, contrary to the impression Verizon would like to give that its discriminatory conduct only affects

¹⁴⁶ Exhibit 61. A copy of Exhibit 61 can be found at VZ App. B-NH, Vol. 6, Tab 14. In this proceeding, Verizon asserts that it has approximately 630 DS-1 loops in service in New Hampshire. Verizon Brief at 45.

a small percentage of loops, the fact is that Verizon's conduct affects a much larger percentage of available bandwidth in New Hampshire. _

Verizon also argued before the NH PUC that the "no facilities" issue is really not an issue because "Verizon NH will build new DS-1 facilities for wholesale customers and for all other access customers on the same terms under its special access tariff."¹⁴⁷ Verizon's statement is misleading and, again, demonstrates that, while Verizon is willing to give an impression that it is complying with its obligations under the Act, its actual practice is much different.

Verizon is "willing" to construct facilities under its special access tariff for a number of self-serving reasons. As an initial matter, special access facilities are significantly more expensive than UNE combinations that provide the same functionality. For example, Verizon stated before the NH PUC that the monthly recurring charge for a DS-1 UNE loop is \$165.33, while the monthly recurring charge for the same facility out of Verizon's special access tariff is \$252.57.¹⁴⁸ The cost difference between DS-1 loops and the same facility purchased as a special access circuit has been magnified by Verizon's agreement to reduce DS-1 loop prices by 20%.¹⁴⁹ Similarly, the monthly recurring charge for DS-1 unbundled interoffice dedicated transport is \$71.24 (plus \$0.13 per mile)¹⁵⁰ while the monthly recurring charge for the equivalent special access facility is \$266.42¹⁵¹ The difference is even greater with respect to DS-3 facilities.¹⁵² The

¹⁴⁷ *Verizon Supplemental Checklist Declaration* at ¶ 81. The nonrecurring charges for a DS-1 UNE loop are slightly higher than those for a special access facility; however, by definition, those charges are only incurred once per line and thus are *de minimus* when compared to the amount of the monthly recurring charge over time.

¹⁴⁸ Dec. 6, 2001 Tr. at 231:12-18.

¹⁴⁹ DT 01-151, June 5, 2002 Letter from J. Michael Hickey, President, Verizon New Hampshire to Thomas B. Getz, Chairman, New Hampshire Public Utilities Commission at 2. A copy of the letter is found at VZ App. B-NH, Vol. 7, Tab 28.

¹⁵⁰ SGAT, Section 5.3.4. A copy of Verizon New Hampshire's Statement of Generally Available Terms is found at VZ App. N-NH, Vol. 1, Tab 1.

¹⁵¹ Verizon FCC Tariff No. 11, Section 31.6.1(A)(3)(c).

result of Verizon's efforts to force CLECs to purchase special access circuits is a substantial increase a CLEC's cost of providing services and thus, a decrease in the CLEC's ability to compete with Verizon.

Verizon further increases the cost of obtaining facilities by binding the CLEC to a minimum term with an early termination fee for the special access circuits. Verizon stated that it requires CLECs to purchase DS-1 or DS-3 special access circuits for a minimum 90-day term.¹⁵³ Verizon's regionwide 90-day minimum term applies to special access circuits that are equivalent to UNEs and special access circuits that are equivalent to EELs.¹⁵⁴ As result, if a CLEC requests high capacity loops or transport, or EELs, and that request is rejected for lack of facilities, the CLEC must either wait until Verizon decides to construct the facilities for its own retail customer(s), and thus lose the prospective customer to Verizon, or purchase a special access circuit and, assuming that the circuit can be converted at some point after expiration of the 90-day minimum term, absorb the additional costs in order to price its services competitively. In either case, CLECs, and consumers suffer, to Verizon's benefit.

2. This Proceeding is the Appropriate Forum to Address Verizon's Discriminatory High Capacity UNE Provisioning Policy and the Commission Has the Authority to Find Verizon Has Not Met its Checklist Obligations Based Upon its High Capacity Provisioning Policy

Citing the *Pennsylvania 271 Order*, Verizon also asserted before the NH PUC that the FCC previously addressed Verizon's "no facilities" policy and stated that the CLECs' complaints

¹⁵² For example, the recurring monthly charge for a conditioned DS-3 loop is \$679.24, SGAT, Section 5.5.2.1, while the recurring monthly charge for DS-3 electrical special access facility is \$2,115.39 per channel termination (Verizon FCC Tariff No. 11, Section 31.6.1(A)(4)(b)) and \$1,923.08 per DS-3 optical facility. Verizon FCC Tariff No. 11, Section 31.6.1(A)(5)(b). Similarly, the monthly recurring charge for DS-3 unbundled dedicated transport monthly is \$554.72 (plus \$3.71 per mile) (SGAT, Section 5.3.4), whereas the monthly recurring charge for the equivalent special access transport is \$825.00 (plus \$155.03 per mile). Verizon FCC Tariff No. 11, Section 31.6.1(C).

¹⁵³ Dec. 6, 2001 Tr. at 225:24-226:10; Dec. 10, 2001 Tr. at 11:19-12:3.

regarding Verizon's performance with respect to high capacity loop and transport provisioning were not appropriate for this proceeding.¹⁵⁵ The Commission's finding in the *Pennsylvania 271 order*¹⁵⁶ was, however, based upon the limited record before the Commission at the time, and the Commission's belief that the issue involved merely interpretation of a Verizon policy, rather than a manifestation of Verizon's consistent pattern of discrimination against CLECs. Given the availability in this proceeding of additional, New Hampshire-specific, evidence on the issue, the Commission should not simply adopt its Pennsylvania reasoning without due consideration.

This Commission has the authority and the obligation to consider whether Verizon has demonstrated, by a preponderance of the evidence, that it has met its Checklist obligations, including its obligation to provide non-discriminatory access to high-capacity loops and transport at just and reasonable rates, terms and conditions. In order to ensure that the public interest in fostering competition and bringing competitive new and innovative advanced telecommunications services to consumers in New Hampshire, this Commission must ensure that CLECs have the same ability as Verizon to bring those services to consumers. If Verizon is permitted to continue its anti-competitive conduct after it obtains Section 271 authority, many of its competitors will be forced out of the market.

C. Verizon's UNE Provisioning is Deficient (Competitive Checklist Items 2 (Non-Discrimination), 4 (Local Loops), 5 (Local Transport), and 11 (Local Number Portability), OSS (CLEC Support Systems))

Section 271(c)(2)(B)(ii) of the Act requires an RBOC seeking in-region interLATA authority to offer "nondiscriminatory access to network elements in accordance with the

¹⁵⁴ Dec. 6, 2001 Tr. at 226:23-227:5.

¹⁵⁵ *Verizon Supplemental Checklist Declaration* at ¶ 68.

¹⁵⁶ *Pennsylvania 271 Order*, at ¶ 92 ("We disagree with commenters that Verizon's policies and practices concerning the provisioning of high capacity loops, *as explained to us in the instant proceeding*, expressly violate the Commission's unbundling rules.") (emphasis added).

requirements of sections 251(c)(3) and 252(d)(1).”¹⁵⁷ Section 251(c)(3), in turn, requires incumbent LECs “to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”¹⁵⁸

In addition, Section 271(c)(2)(B)(xi) of the Act requires “[u]ntil the date by which the [FCC] issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.” Number portability is defined in Section 3(30) of the Act as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”

BayRing provided record evidence showing that Verizon has failed to demonstrate its compliance with Checklist Items 4 and 11, among other things, because the quality of service that Verizon provides BayRing is woefully inadequate. Specifically, BayRing demonstrated that: (1) Verizon consistently ignores crucial order dates that have been entered and confirmed in Verizon systems causing increased cost to BayRing as well as substantial operational problems from New Hampshire consumers that have opted to use a Verizon competitor;¹⁵⁹ (2) the processes Verizon uses to provision services are generally inefficient and do not allow for a

¹⁵⁷ 47 U.S.C. § 271(c)(2)(B)(ii).

¹⁵⁸ 47 U.S.C. § 251(c)(3).

¹⁵⁹ BayRing App. A, Tab 4, Exhibit 37 at ¶¶ 25, 29-41, 44.

smooth and timely coordination of efforts with BayRing;¹⁶⁰ (3) many of Verizon's personnel that are assigned to provision BayRing's orders either lack of experience or preparation, or even worse, are uncaring and unresponsive;¹⁶¹ (4) Verizon service representatives are not knowledgeable of Verizon's escalation procedures for BayRing, or any CLEC, to utilize to expeditiously *resolve service disruptions to emergency facilities*.¹⁶² As a result, BayRing's relationship with Verizon is extremely difficult and costly because BayRing's efforts to compete are constantly frustrated and thwarted by these problems. BayRing supported these assertions with four recent examples that typify Verizon's deficient provisioning performance that occurred just days before BayRing's October 1, 2001 declaration was filed.

The most significant of the examples provided by BayRing involved a fifteen-hour outage at Exeter Hospital caused by Verizon's poor provisioning process and lack of adherence to its own procedures. BayRing submitted an order for Verizon to reassign 5 DID blocks or 500 numbers that serve Exeter Hospital to BayRing.¹⁶³ The order required that Verizon reassign the numbers on September 19, 2001, and when Verizon executed the order on that date, the hospital's telephone service was lost. During the next fifteen hours, BayRing worked frantically to resolve the problem, but Verizon's representatives were unconcerned about the seriousness of the problem, were not in a position to resolve the problem, and refused to notify someone who could. At one point, a Verizon representative stated that the line and numbers in question were provisioned by another CLEC, so any request dealing with the line had to be initiated by that CLEC; however, the representative refused to provide BayRing the name of the CLEC.¹⁶⁴

¹⁶⁰ BayRing App. A, Tab 4, Exhibit 37 at ¶¶ 25-28, 42-44.

¹⁶¹ BayRing App. A, Tab 4, Exhibit 37 at ¶¶ 25, 41, 44.

¹⁶² BayRing App. A, Tab 4, Exhibit 37 at ¶¶ 29-41.

¹⁶³ BayRing App. A, Tab 4, Exhibit 37 at ¶30.

¹⁶⁴ BayRing App. A, Tab 4, Exhibit 37 at ¶32.

Sometime after 12:00 am on September 19, 2001, BayRing identified the CLEC and, at BayRing's request, a representative of that company, contacted Verizon again to resolve the problem.¹⁶⁵ Incredibly, the Verizon representative stated that nothing could be done because the line had been transferred to BayRing, and therefore, BayRing, rather than the other CLEC, would have to initiate any calls relating to the number.¹⁶⁶

It was not until BayRing contacted Mr. Alan Cort, Verizon's Director of Regulatory Affairs for New Hampshire, that Verizon personnel even made an effort to resolve the issue. Mr. Cort instructed Verizon's customer service representatives to work with BayRing to resolve the problem and was able to get a Verizon switch technician on a conference call with BayRing's Staff to troubleshoot and fix the problem.¹⁶⁷ Within minutes of the switch technician's involvement, the problem was resolved.

Unbelievably, during the entire event, Verizon's service representatives refused to do anything despite the urgency of the situation and were otherwise disinclined to take the necessary steps needed to cure the problem. Significantly, when Mr. Cort became involved, he contacted the very same people with whom BayRing had been dealing over the preceding hours, and requested the same action BayRing had requested numerous times previously.¹⁶⁸ When BayRing attempted to escalate the problem, Verizon's representatives stated that they would not do so at that time,¹⁶⁹ yet Mr. Cort was able to get the situation resolved promptly. Clearly, notwithstanding the assistance provided by Mr. Cort, Verizon's conduct towards BayRing during this emergency demonstrates Verizon's overall corporate policy to discriminate against CLECs

¹⁶⁵ BayRing App. A, Tab 4, Exhibit 37 at ¶34-35

¹⁶⁶ BayRing App. A, Tab 4, Exhibit 37 at ¶35.

¹⁶⁷ BayRing App. A, Tab 4, Exhibit 37 at ¶29.

¹⁶⁸ Dec. 7, 2001 Tr. at 101:11-18.

¹⁶⁹ Dec. 7, 2001 Tr. at 101:3-9.

and, while appearing to comply with its obligations on the surface, actually providing CLECs with as little cooperation as possible.

The other examples involved (1) Verizon's artificial delay in provisioning a loop from Verizon's Portsmouth, New Hampshire central office to a customer located in Kittery, Maine, despite multiple orders from BayRing and the involvement of the New Hampshire and Maine commission staff;¹⁷⁰ (2) Verizon's refusal to properly or timely correct a trouble ticket on a T-1 circuit in Exeter, New Hampshire, which required BayRing to submit the same trouble ticket five times before Verizon agreed to meet and discovered that it has improperly wired the circuit;¹⁷¹ and (3) additional customer interruptions as a result of Verizon's failure to port twenty-three numbers to BayRing properly.¹⁷²

Verizon did not offer *any* substantive response to BayRing's evidence. Rather, Verizon attempted to downplay the significance of the evidence by claiming that BayRing only provided "isolated" examples and claiming that, regardless of the validity of BayRing's provisioning concerns, Verizon's escalation process is an appropriate fail-safe that CLECs can rely upon as a means to get Verizon's ongoing and pervasive provisioning problems resolved.¹⁷³ While the existence of an escalation process may, if it functions properly, which Verizon's does not,¹⁷⁴ foster the resolution of some issues, it does nothing to address the cause of those problems or to

¹⁷⁰ BayRing App. A, Tab 4, Exhibit 37 at ¶¶26-28.

¹⁷¹ BayRing App. A, Tab 4, Exhibit 37 at ¶¶42-43.

¹⁷² BayRing App. A, Tab 4, Exhibit 37 at ¶44. BayRing also provided additional examples in response to Verizon's Information Requests. *See* BayRing App. B, Tab 2, Exhibit 43; BayRing Communications Responses to Verizon Data Requests VZ-BR 1-12, 1-17, and 1-21 in this proceeding (attached hereto as BayRing App. A, Tab 12.). The examples provided by BayRing are by no means the only incidents where BayRing has encountered problems with Verizon's provisioning. BayRing App. A, Tab 4, Exhibit 37 at ¶45; Dec. 7, 2001 Tr. at 48:20-49:18. Rather, they are meant to provide the Commission a broad sample of the types of problems CLECs frequently encounter and the anti-competitive results of those experiences.

¹⁷³ *Verizon Supplemental Checklist Declaration* at ¶ 90.

¹⁷⁴ Dec. 7, 2001 Tr. at 41:6-42:10, 49:13-18.

prevent such problems from recurring, which many do in BayRing's experience. In addition, CLECs should not have to rely on an escalation process in order to obtain properly provisioned, timely order completion. Verizon cannot cite the manner in which it deals with problems created by deficiencies in its provisioning process as evidence that it has complied with the Checklist requirements. First, Verizon must demonstrate that it actually provides nondiscriminatory access to UNEs; Verizon has not done so in this proceeding.

Moreover, contrary to Verizon's characterization of BayRing's claims concerning the behavior, intent and performance of Verizon personnel,¹⁷⁵ the evidence BayRing provided further demonstrates the pervading corporate attitude at Verizon that it is forced to deal with CLECs and that it will therefore limit its cooperation with CLECs to the minimum required by law and provide as little support to CLECs as possible.¹⁷⁶ Not surprisingly, now that Verizon seeks Section 271 authority, it is on its best behavior, and is making efforts to resolve long-overdue problems;¹⁷⁷ however, BayRing submits that once Verizon has received Section 271 approval, it will return to doing the absolute minimum necessary to comply with its legal obligations.¹⁷⁸ The evidence provided by BayRing is intended to give the Commission a full, accurate, and raw perspective of BayRing's experiences with Verizon as an example of Verizon's attitude toward CLECs specifically, and competition generally.

On the basis of this record evidence, the NH PUC's March 1, 2002 letter noted the PUC's "concern " about Verizon's "corporate commitment to serving CLEC customers" and omitted

¹⁷⁵ Verizon states that BayRing's claims are unprofessional and not worthy of comment. *Verizon Supplemental Checklist Declaration* at n.14

¹⁷⁶ Dec. 7, 2001 Tr. at 48:22-49:8

¹⁷⁷ Dec. 7, 2001 Tr. at 48:22-49:8.

¹⁷⁸ Dec. 7, 2001 Tr. at 63:1-13. The substantial backsliding fines the FCC has levied against Verizon in New York demonstrate that once Verizon obtains 271 approval, it reverts back to its historical anticompetitive, discriminatory conduct.

Checklist Items 4 and 11 from the list of Checklist Items that the NH PUC concluded Verizon had met. While, after the legislative pressure discussed in Section II, above, the NH PUC changed its view as to Verizon's Checklist compliance, Commissioner Brockway's Deliberation Statement, concurred in by Commissioner Geiger, continued to assert that "improvements . . . are necessary in Verizon's treatment of its local competitors and their customers."¹⁷⁹ BayRing submits that this Commission should require that Verizon make those "necessary" improvements *before* it awards Verizon the carrot of 271 authority, rather than hoping that Verizon's behavior will improve after it has received that carrot. As the Commission has repeatedly observed, Section 271 requires present, not future, compliance.¹⁸⁰

IV. THE GRANT OF VERIZON'S APPLICATION WOULD NOT BE IN THE PUBLIC INTEREST

A. Legal Standard

Section 271(d)(3)(C) of the Act directs that the Commission shall not give Section 271 authorization unless the requested authorization is consistent with the "public interest, convenience and necessity."¹⁸¹ This public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.¹⁸² The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission "in evaluating section 271 applications . . . perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications

¹⁷⁹ BayRing App. A, Tab 15, at p. 2.

¹⁸⁰ *SBC TX 271 Order* at ¶ 67.

¹⁸¹ 47 U.S.C. § 271(d)(3)(C).

¹⁸² *See* 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

Act.”¹⁸³ As a Senate Report noted, the public interest standard is “the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill.”¹⁸⁴ The Report went on to add that “in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC’s decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services.”¹⁸⁵

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. The Commission noted that under the standard it was given “broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest.”¹⁸⁶ The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.¹⁸⁷ The Commission explicitly recognized that “Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority.”¹⁸⁸

Predictably, the RBOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has

¹⁸³ *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 385 (1997) (“*Ameritech Michigan 271 Order*”).

¹⁸⁴ *Id.* at n. 992, quoting, S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

¹⁸⁵ *Id.*

¹⁸⁶ *Ameritech Michigan 271 Order* at ¶ 383.

¹⁸⁷ *Id.* at ¶ 385.

¹⁸⁸ *Id.*

implemented the competitive checklist.¹⁸⁹ BellSouth also contended that the Commission's responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.¹⁹⁰ The Commission rejected both of these claims and reaffirmed that it will consider "whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market."¹⁹¹ The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."¹⁹² As the Department of Justice has noted, in-region, interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.¹⁹³

The importance of the public interest standard was reaffirmed by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.¹⁹⁴ In that letter the Senators stated:

[t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of

¹⁸⁹ *In the Matter of the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 361 (1998).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

¹⁹² *Ameritech Michigan 271 Order* at ¶ 386.

¹⁹³ *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also*, *Ameritech Michigan 271 Order* at ¶ 382.

¹⁹⁴ Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) ("*Senators' Letter*").

the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.¹⁹⁵

B. Price Squeeze

In a ruling issued with regard to SBC's 271 application in Kansas and Oklahoma, the U.S. Court of Appeals for the D.C. Circuit noted the importance, for purposes of a Section 271 analysis, of ensuring that UNE rates comport not only with TELRIC requirements, but also with the public interest standard. The Commission had argued that because it found that rates complied with TELRIC, it need not consider whether they created a "price squeeze," in which CLECs could not profitably serve customers (particularly residential customers) with UNEs purchased at TELRIC rates. The Court of Appeals rejected this argument, noting that for Section 271 purposes:

to the extent that an agency can confidently identify TELRIC rates only within some band, like those involved under conventional "just and reasonable" regulation, the possibility exists that the agency has chosen too high a point within the band.¹⁹⁶

The court directed that the FCC should consider whether the level for UNE rates-- fixed by the state commissions and approved by the FCC itself--precluded profitable entry. The court noted:

as the Act aims directly at stimulating competition, the public interest criterion may weigh more heavily towards addressing potential "price squeeze."¹⁹⁷

If the cost of the inputs that Verizon charges are too high, they could preclude the development of competition, which would not be in the public interest. The D.C. Circuit noted that if there is in fact a price squeeze, a remedy would be to fix the wholesale rates at a lower level within "the

¹⁹⁵ *Id.* at 3.

¹⁹⁶ *Sprint Communications Co., L.P v. FCC*, 274 F.3d at 549, 555 (D.C. Cir. 2001).

¹⁹⁷ *Id.*

zone of reasonableness.”¹⁹⁸ The D.C. Circuit decision explicitly makes a profitability analysis relevant under Section 271. As the D.C. Circuit noted:

In fact, the Commission gave appellants' claim rather a brush-off. First, the Commission said that under its reading of the Act, the "profitability" considerations raised by appellants were "irrelevant" because the Act directed it to assure that the rates were cost-based, "not [to determine] whether a competitor can make a profit by entering the market." Order ¶ 92; see also *id.* ¶ 65. This, of course, is unresponsive. The issue is not guarantees of profitability, but whether the UNE pricing selected here *doomed* competitors to failure.¹⁹⁹

The Commission has held that since it has not yet addressed the issues remanded by the D.C. Circuit, it will consider the specific allegations presented by the parties in the application.²⁰⁰ The Commission has intimated, however, that it will examine whether “the UNE pricing [at issue] *doom[s]* competitors to failure”²⁰¹ and whether there is “sufficient profit for an efficient competitor.”²⁰² The record established in the New Hampshire proceeding shows that, in the vast majority of the state, the UNE rates do provide for a “sufficient profit for an efficient competitor” to serve residential customers. Given this factor, the UNE pricing in New Hampshire has “doomed competitors to failure,” at least in the residential market.

1. CLECs Demonstrated a Price Squeeze in the State Proceeding

As CLECs demonstrated in the state proceeding, a comparison of the UNE rates in New Hampshire with Verizon’s retail rates demonstrate that UNE rates are set too high to permit profitable entry in the residential marketplace and that they also foreclose profitable entry into certain segments of the business marketplace. In conducting a rate comparison, it is not enough to compare the wholesale UNE rates with retail rates. One must also take into account the other

¹⁹⁸ *Sprint Communications Co., L.P. v. FCC*, 274 F.3d at 555.

¹⁹⁹ *Sprint Communications Co., L.P. v. FCC*, 274 F.3d at 554.

²⁰⁰ *Vermont 271 Order* at ¶ 66.

²⁰¹ *Vermont 271 Order* at ¶ 66.

²⁰² *New Jersey 271 Order* at ¶ 172.

costs that a CLEC will incur in providing service to the particular customers. As noted in the BayRing/Network Plus Pricing Declaration, foremost amongst these costs is the cost of collocation that the CLEC must incur to provide service to a customer.²⁰³ A CLEC is looking at over \$21,000 simply in non-recurring charges in preparing a collocation space.²⁰⁴ This figure does not include the cost of the equipment that the CLEC will place in the collocation space. This figure also does not include recurring collocation charges, including the recurring costs of collocation power, which, as noted above in the pricing section, is a significant cost driver. As of this date, given Verizon's decision to appeal the NH PUC's determination of the collocation power rates, the rates for collocation power are still undetermined.

In addition, the CLEC will experience marketing costs, billing and collection costs, switch and transport costs, and overhead expenses. When these costs are factored in, it becomes clear that there is no way that CLECs can use UNEs to enter the residential market or the suburban and rural zones of the business market in New Hampshire profitably.

Exhibits 69A and B, submitted by BayRing and Network Plus before the NH PUC, comprise a detailed cost analysis which demonstrates how Verizon's UNE rates in New Hampshire will not promote competitive entry in residential markets, will preclude competition for business customers in rural areas, and may inhibit competition for business customers in suburban areas.²⁰⁵

Exhibit 69A and 69B constitute a cost and profitability analysis that takes Verizon's retail and UNE rates and determines the viability of market entry for a variety of services. Specifically

²⁰³ BayRing App. A, Tab 8. Exhibit 69.

²⁰⁴ BayRing App. A, Tab 8. Exhibit 69 at ¶ 24.

²⁰⁵ See BayRing App. B, Tabs 3 and 4, Exhibits 69A and 69B.

the analysis looks at DS1 loops, flat rated residential service via UNE-P (migration orders),²⁰⁶ flat rated residential service via UNE-P (new orders), flat rated residential service via UNE loops, UNE loop (1 loop orders), and UNE loop (2 to 9 loops orders). The analysis looks at the service by zones and determines whether it would be profitable for the CLEC to provide the particular service in the particular zone. This determination is made by examining whether a CLEC will be able to recoup the non-recurring charge paid to Verizon for providing service to a particular customer, and if so, how long it would take for the CLEC to recoup this cost. It should be noted that in addition to the nonrecurring charge paid to Verizon, CLECs have significant internal non-recurring costs associated with beginning service.²⁰⁷ The analysis does not limit itself to a particular market segment but instead looks at a variety of services a CLEC may offer, *i.e.*, residential service both via UNE-P and UNE loop, business service via UNE loop, and business service via high-capacity DS-1 facilities. The analysis did not consider access revenue or toll revenue in the CLEC revenue. As noted in more detail in the analysis of Verizon's UNE-P study below, access revenues are steadily decreasing, and, given calling patterns, CLEC access revenues may represent a "washout" vis-à-vis access charges CLECs will be required to pay to

²⁰⁶ The UNE-P is defined as loop and port combinations previously utilized by Verizon New Hampshire to provide local exchange and associated switched exchange access services. SGAT § 5.12.1.1. The UNE-P consists of the unbundled local loop, unbundled local switching, unbundled shared trunk port and common (shared) transport, signaling systems and call related databases, optional directory assistance services and operator services, and optional dedicated trunk port. SGAT § 5.12.1.2. The monthly recurring price for the UNE-P is based on the applicable recurring rate for each separate network element of the UNE-P arrangement coupled with applicable usage charges. SGAT § 5.12.4.

²⁰⁷ The methodology of the analysis is explained in ¶¶ 27-32 of BayRing App. A, Tab 8, Exhibit 69; *see also*, Jan. 22, 2002 Tr. at 154: 4 to 156: 24. A copy of the January 22nd transcript is found at VZ App. B-NH, Vol. 6, Tab 17.

Verizon.²⁰⁸ The analysis also did not consider toll revenues, given the increasingly speculative nature of such revenue.²⁰⁹ In addition, to generate toll revenue, a CLEC incurs costs as well.

The results in regard to residential service are quite disquieting. For residential service via UNE-P, there are no areas in New Hampshire in which CLECs can recover their costs, much less achieve a profit.²¹⁰ Moreover, it is not a case where CLECs could come close to making a profit such that residential service could be considered a loss leader. In the urban zone for UNE-P migration, the losses would range from \$1.35 to \$3.85 per month. In the suburban zone, the losses ranges from \$5.42 to \$7.92 per month, and in the rural zone, the losses range from \$24.25 to \$26.75 per month.²¹¹ For UNE-P (New) orders, the margins are similar.²¹² Thus, profitable residential service via UNE-P is not even a close call. CLECs would lose tremendous amounts of money in trying to service this market under the current UNE rates.

Two significant cost drivers of the price for the UNE-P will be the recurring charge for the unbundled local loop and unbundled local switching. High loop rates coupled with high usage rates will detrimentally impact the viability of the UNE-P product. CLECs will be impacted in their ability to serve both low-volume and high-volume customers via UNE-P. The high loop rates will serve as an impediment to serving the low-volume customer, and the high usage rates will penalize the high-volume customer. The analysis provided in Exhibits 69A and

²⁰⁸ See Section IV.B.3, *infra*.

²⁰⁹ A CLEC also would not be likely to get the corresponding toll revenue that Verizon lists in the Retail portion of its UNE-P study found in Attachment 4 to the Hickey/Garzillo/Anglin Declaration. In addition, CLECs do not generally factor in interLATA toll revenue in making their determination to serve a particular customer because such toll revenues are decreasing and the provision of toll service will incur corresponding expenses to provide the toll service. Jan. 22, 2002 Tr. at 169: 1-7. The decision to serve the particular residential customer will be made on whether providing local residential service to that customer is profitable Jan. 22, 2002 Tr. at 168: 8-10. Toll usage, and therefore, toll revenue is also declining. The usage a carrier could have counted on a few years ago or even a year ago is declining as more people look to alternatives for toll calls, such as wireless service. Jan. 22, 2002 Tr. at 169: 1-7.

²¹⁰ BayRing App. B, Tab 4, Exhibit 69B at Tabs 1 and 2.

²¹¹ BayRing App. B, Tab 4, Exhibit 69B at Tab 1 – Residential (UNE-P Migration).

69B demonstrates how the high UNE rates undermine the effectiveness of UNE-P as a market entry strategy.

A principal driver in UNE-P costs is cost of switch usage; recent years have seen a trend in increased local residential usage, which has led to increases in local originating switch usage.²¹³ The effect of this increased usage is that unbundled local switching rates have a much greater effect on the total price of the UNE-P.²¹⁴

The National Research Regulatory Institute (“NRRI”) conducted a survey of UNE prices in the United States.²¹⁵ The survey showed an average monthly UNE switching cost of \$7.92 in New Hampshire based upon 1,000 MOU. In comparison, in New York, Massachusetts, and Pennsylvania, the average monthly switching costs, based on 1,000 minutes of usage, were \$2.75, \$3.30, and \$1.71 respectively.²¹⁶ Thus, New Hampshire’s excessive switching costs, even after Verizon’s agreement to reduce switching costs by 17.7%, coupled with its high loop rates, not only impedes the use of UNE-P, it effectively precludes it.

Residential service via UNE loops offers a glimmer of profitability, but only in Rate Group E where the central office is listed as urban, and only if the CLEC is willing to wait 316 months to recover its initial investment.²¹⁷ There are three exchanges that come under this classification, Manchester, Portsmouth, and Nashua. Essentially there is a prospect for viable

²¹² BayRing App. B, Tab 4, Exhibit 69B at Tab 2 – Residential (UNE-P New).

²¹³ *Application of Verizon New Jersey, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 01-347, Comments of WorldCom, Inc., Declaration of Vijetha Huffman at ¶ 9 (Jan. 14, 2002).

²¹⁴ *Id.*

²¹⁵ A copy of the report can be found at:

<http://www.nrri.ohio-state.edu/programs/telcom/pdf/matrix-07-01-01.pdf>

²¹⁶ BayRing App. A, Tab 8, Exhibit 69 at ¶ 59.

²¹⁷ BayRing App. B, Tab 4, Exhibit 69B at Tab 3 – Residential (UNE). The losses for residential service via UNE loops are similar to those for residential service via UNE-P.

residential competition in 3 out of 118 exchanges in New Hampshire, and only if a CLEC is willing to wait 26 years to recover its investment. Thus, there is no hope of residential competition in New Hampshire. The fact that lack of profitability permeates all zones in New Hampshire, and both via use of UNE Platform and via UNE loops, demonstrates that difficulty in entering the residential market is not the result of subsidized local residential rates in one or more zones, but rather is due to the fact that UNE rates are not at an appropriate point in the TELRIC range.²¹⁸ The fact that the analysis for the business market in New Hampshire demonstrates a similar lack of profitability underscores the fact that the price squeeze is not the result of higher business rates subsidizing some residential rates.²¹⁹

CLECs are forced by the high UNE rates either to abandon New Hampshire or to be cream skimmers and focus primarily on business customers in urban, and perhaps suburban areas. As the above analysis demonstrates, this is a matter of necessity, not choice. Given the current UNE rates in New Hampshire, a CLEC cannot viably enter the residential market. The only way to achieve UNE-based residential competition is to lower UNE rates to a level that will promote competitive entry in those markets. This is especially true of UNE loop rates, which are required in all UNE-based strategies, and which, as shown in Section II.F. above, are higher than loop rates in any other Verizon state in which the FCC has awarded Section 271 authority.

Attached to the Declaration of Benjamin Thayer as Attachment 2 is an updated price squeeze analysis that BayRing has developed for this proceeding. The analysis contains two tables. The first table examines CLEC costs by zone (urban, suburban, and rural) that would be incurred by an efficient carrier. The costs factored into the analysis are loop (Verizon's current UNE loop rates), sales (sales/marketing), facilities (collocation, switching and transport costs),

²¹⁸ *Vermont 271 Order* at ¶ 68.

²¹⁹ *Id.*

operations (company overhead not including sales and billing/collection costs) and billing/collection (costs for billing for services and collection costs).²²⁰ These costs do not include the \$29.52 in nonrecurring charges for the loop that a CLEC will have to recover.²²¹

The second table looks at residential revenue. The residential revenue figures are derived from BayRing App. B, Tab 4, Exhibit 69B, which was the profitability analysis BayRing and Network Plus submitted to the New Hampshire PUC. The revenue figure is based on Verizon's retail rates by rate group in New Hampshire and includes subscriber line charge and features revenue. The figures also include a 10% discount, because if a CLEC hopes to win a Verizon customer it must charge less than Verizon.

Comparison of the figures in the two tables demonstrates that in all rate groups in all zones in New Hampshire an efficient CLEC cannot generate a profit by serving the residential customer. Exchanges in Rate Group E for all three zones provide the opportunity for the most revenue for the CLEC and are therefore a telling indicator of what margins a CLEC can expect. In the urban zone, even for those areas in Rate Group E, CLECs would face a negative margin of **[BEGIN PROPRIETARY] XXX [END PROPRIETARY]**. Rate Group E in the suburban zone would produce a negative margin of **[BEGIN PROPRIETARY] XXX [END PROPRIETARY]**, and Rate Group E in the rural zone would produce a negative margin of **[BEGIN PROPRIETARY] XXX [END PROPRIETARY]**. In the other rate group areas in the urban, suburban, and rural zones the margins are even worse.²²²

Thus, there is clearly a pronounced price squeeze, and even the reductions in rural rates did nothing to alleviate the price squeeze. Even if a CLEC could cobble together some

²²⁰ Thayer Declaration at ¶ 18.

²²¹ See BayRing App. B, Tab 4, Exhibit 69B.

²²² Thayer Declaration at ¶ 20.

speculative and increasingly diminishing toll and access revenue, the price squeeze precludes the CLEC from serving the residential customer . Even if a CLEC could reduce its already spare overhead,²²³ the price squeeze precludes competitive entry.²²⁴

This is the reality that the NH PUC faced and sought to address in DT 01-151. Under pressure from Verizon and the Telecommunications Oversight Committee, they were forced to ignore this grim competitive reality and further the interests of Verizon. The public interest standard requires that all markets in New Hampshire be open to competition at the time of Verizon's application. The competitive numbers in New Hampshire and the price squeeze BayRing has demonstrated, and continues to demonstrate, unequivocally show that the New Hampshire residential market is not open to competition nor is there any hope that it will be in the future.

2. The Lack of Competitive Entry in New Hampshire Bears Out the Fact that there Is A Price Squeeze

While the Commission has not required an RBOC to show a loss of a specific percentage of its market share, it has found data on the "nature and extent of actual local competition" to be relevant to its public interest inquiry.²²⁵ If there is a lack of competitive entry, the Commission will examine if this lack of entry is due to "the BOC's failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason."²²⁶

²²³ It should be noted that given the downturn in the telecommunications industry CLECs have already had to reduce their overhead levels to the bare minimum necessary to provide quality service.

²²⁴ Thayer Declaration at ¶ 21.

²²⁵ *Ameritech Michigan 271 Order* at ¶ 391.

²²⁶ *Id.*

There is a clear lack of competitive entry in New Hampshire, particularly in the residential market. Verizon's statistics as to the number of competitive residential lines is very sobering and corroborates the price squeeze analysis above. Residential service via UNE-P is virtually non-existent. As of the date of the data furnished by Verizon (March 2002), there were only **[BEGIN PROPRIETARY] XXX [END PROPRIETARY]**²²⁷ residential UNE-P lines. Moreover, **[BEGIN PROPRIETARY] XXX [END PROPRIETARY]** of those lines were provisioned by Network Plus, a carrier that was going through bankruptcy at the time, and has probably since lost a large number of those lines.²²⁸ At the time of its application in Pennsylvania, Verizon had provisioned 197,000 UNE-P combinations that were used to provide residential service.²²⁹ In New York, at the time of that application, over 137,000 UNE-P arrangements were used to provide residential service.²³⁰ Even allowing for the relative size of the states, the use of UNE-P in New Hampshire is several orders of magnitude behind that of other Verizon states at the time of their 271 applications.²³¹ This Commission must ask why is the UNE-P based residential competition found in other states lacking in New Hampshire. The cost analysis provided above demonstrates why UNE-P competition is virtually non-existent in New Hampshire, particularly in the residential market.

Residential competition via UNE loops is also virtually non-existent. According to Verizon, there are **[BEGIN PROPRIETARY] XXXX [END PROPRIETARY]**²³² residential facilities-based lines and all but 200 of these lines belong to AT&T Broadband, a cable provider

²²⁷ WC 02-157, Verizon Application, Torre Declaration, Attachment 1, Exhibit B.

²²⁸ BayRing respectfully suggests that the Commission request that Verizon update this data in light of Network Plus's bankruptcy.

²²⁹ *Pennsylvania 271 Order*, at ¶ 71, n. 260.

²³⁰ *New York 271 Order*, at ¶ 14.

²³¹ Jan. 22, 2002 Tr. at 39: 8-19.

that does not purchase any UNE loops.²³³ The presence of cable lines is no indication that a Section 271 applicant has opened its market to UNE-based competition particularly when this is the only residential competition that is demonstrated. Section 271 focuses on how Verizon has opened its market to competitors. In particular, as noted above, in the *Michigan 271 Order*, the FCC ruled that a Section 271 public interest analysis must examine whether Verizon has made “all” entry strategies viable for both business and residential customers. Verizon admitted that cable is only one entry strategy and providing service through use of UNEs is a distinct entry strategy.²³⁴ Since Verizon has failed to demonstrate that it has opened business and residential markets “fully and irreversibly” to competition via use of UNEs, it cannot meet the requirements of Section 271 regardless of the number of cable telephony lines. Verizon’s claim would lead to the untenable position that the public interest test would be met regardless of how high UNE rates are simply because in a limited geographic area a single cable provider can provide residential service without the use of UNEs.

Of the remaining 200 facilities-based lines (which may include UNE loops), Verizon claims **[BEGIN PROPRIETARY] XXX [END PROPRIETARY]** belong to BayRing and **[BEGIN PROPRIETARY] XX [END PROPRIETARY]** to Broadview/Network Plus.²³⁵ As both BayRing and Network Plus noted in the hearing before the NH PUC, that while they would like to, they generally do not target residential customers in New Hampshire because of the high

²³² WC 02-157, Verizon Application, Torre Declaration, Attachment 1, Exhibit B.

²³³ This number of lines may be overstated. Before the NH PUC, it was shown that Verizon’s figures were derived from Verizon’s improper use of proprietary E911 database information, and since the information was proprietary, precluded the ability of CLECs to examine the numbers to challenge their veracity. Jan. 22, 2002 Tr. at 53-55. Later in the hearing, Verizon produced Exhibit 67, which contained public E911 information and showed that the actual number was more in the vicinity of **[BEGIN PROPRIETARY] XXXXX [END PROPRIETARY]** lines and only came from one cable provider, AT&T Broadband. Jan. 22, 2002 Tr. at 112: 8-13; 113: 1-2.

²³⁴ Jan. 22, 2002 Tr. at 66: 19-23.

²³⁵ These numbers are from March 2002. Since Network Plus has declared bankruptcy, this may affect the number of lines. Verizon should be required to provide updated figures.

UNE rates.²³⁶ The residential customers they do have are customers, or employees of customers, for whom they are already providing business service.²³⁷ These customers are generally not profitable for either BayRing or Network Plus and are generally “loss leaders.”²³⁸ In fact, BayRing had to raise its residential rates because of Verizon’s excessive UNE rates, and has obtained only one new residential customer since it did so in April, 2002.²³⁹ Thus, save for AT&T’s cable service, there is virtually no facilities-based residential competition in New Hampshire.²⁴⁰

3. Verizon’s UNE-P Study Is Flawed

The Verizon UNE-P study is flawed, and therefore does not provide any accurate insight into the price squeeze analysis. Therefore, Verizon cannot carry its burden of showing that Verizon’s New Hampshire UNE prices will permit CLECs to serve residential customers without being caught in a “price squeeze.” First, the study, as presented in Attachment 4 to the Hickey/Garzillo/Anglin Declaration is much too simplistic and reflects the lack of thought that Verizon had paid to this issue. Verizon’s analysis is based upon the weighted average of the revenues Verizon derives from *both business* and *residential* customers.²⁴¹ Accordingly, it provides no insight into the margin available from the average *residential* customer.²⁴² The

²³⁶ Jan. 22, 2002 Tr. at 184: 3-5, 184: 17-22.

²³⁷ Jan. 22, 2002 Tr. at 183: 19-23; 184: 14-16. As with Network Plus’s loop customers, it is likely that Network Plus has, as a result of its bankruptcy, lost many of its UNE-P customers since the date of the data furnished by Verizon. We respectfully suggest that the Commission ask Verizon to update these data as well.

²³⁸ Jan. 22, 2002 Tr. at 184: 1-2; 184: 14-17.

²³⁹ Thayer Declaration at ¶ 24.

²⁴⁰ There is also very little resale competition for residential customers. WC 02-157, Verizon Application, Declaration of John Torre at Att. 1 ¶ 6, Table 1.

²⁴¹ Jan. 22, 2002 Tr. at 14: 24; 15: 1.

²⁴² Jan. 22, 2002 Tr. at 15: 1-7.

average customer revenues used by Verizon would be particularly inflated because business customers generate more revenue per line and generally take multiple lines.²⁴³

Verizon's attachment, however, validates the criticisms raised by BayRing above. Verizon obtains [BEGIN PROPRIETARY] XXX [END PROPRIETARY] in monthly Local/SLC revenue from the "average customer."²⁴⁴ Since Verizon's data pertaining to the so-called "average customer" combines both residential and business customers, this precludes a breakdown of margin between residential and business customers.

In response to a data request made by the NH PUC Staff in the state proceeding for data for the average residential customer, however, Verizon did provide revenue data for an "illustrative residential customer."²⁴⁵ While an "illustrative" residential customer is not necessarily an "average" residential customer, it is fair to infer that in a response to a question calling for data for the "average" residential customer, Verizon would not have chosen as an "illustrative" residential customer one that generated less revenue than the average residential customer. Reference to this analysis sheds some insight into the margin for residential customers. The loop cost for the UNE-P customer in Verizon's study is [BEGIN PROPRIETARY] XXXX [END PROPRIETARY]. Thus, when the port cost is factored in, and an appropriate switching cost is factored in,²⁴⁶ the monthly costs would far exceed the [BEGIN PROPRIETARY] XXXX [END PROPRIETARY] basic revenue that Verizon stated it obtains from its "illustrative" residential customer. For instance, using Verizon's switching

²⁴³ Jan. 22, 2002 Tr. at 18: 16-24; 19: 1-4.

²⁴⁴ Attachment 4 to Hickey/Garzillo/Anglin Declaration.

²⁴⁵ BayRing App B, Tab 5, Attachment to Record Request No. 68.

²⁴⁶ Verizon uses a [BEGIN PROPRIETARY] XXXXXXXXXXXXXXXXXXXX [END PROPRIETARY]. Joint CLECs used a [BEGIN PROPRIETARY] XXX [END PROPRIETARY] figure which focused just on local switching costs and was computed before the 17.7% switching rate reduction.

and port costs of [BEGIN PROPRIETARY] XXXXXXX [END PROPRIETARY] would result in an average monthly cost to the CLEC of [BEGIN PROPRIETARY] XXXX [END PROPRIETARY]. Thus, even under Verizon's analysis, residential service is not profitable.²⁴⁷ This does not factor in any CLEC overhead.

If the Commission does consider Verizon's study it should recognize, and factor into its analysis, the flaws in Verizon's study. The Verizon study analyzes two customers (1) an "average" customer and (2) a customer that uses the Residential Local Service Package which is a combination of flat, unlimited local calling, three features, and unlimited directory assistance.²⁴⁸ As discussed above, the "average" customer data discloses nothing at all about the profitability of serving a residential customer, because it combines data for residential and business customers. And only [BEGIN PROPRIETARY] XXX [END PROPRIETARY] of Verizon's customers subscribe to the Residential Local Service Package, so the analysis does not provide insight into the margin for the [BEGIN PROPRIETARY] XXX [END PROPRIETARY] of the customers that do not. Verizon clearly used this number to maximize potential revenue from a customer, as the average Local Package customer generates approximately [BEGIN PROPRIETARY] XX [END PROPRIETARY] per month more in revenue than the average flat rate, unlimited service customer.²⁴⁹ Furthermore, to the extent that a CLEC competes for, and obtains, customers desiring service comparable to Verizon's Local Package, to serve such a customer, Verizon admitted that a CLEC would incur expenses such as

²⁴⁷ Verizon also factors in as revenue toll revenue, access revenue and "other" (features and time and materials and inside wire maintenance) revenue. As shown below, CLECs cannot rely on these other sources of revenue to offset their costs of providing service. Moreover, some of these revenues, such as time and materials charges and inside wire maintenance, can only be garnered by incurring costs that Verizon's study fails to consider.

²⁴⁸ Hickey/Garzillo/Anglin Declaration at ¶ 66; Jan. 22, 2002 Tr. at 15: 17-24.

²⁴⁹ Jan. 22, 2002 Tr. at 15:17-22;17:19-18:6.

unlimited directory assistance, which are not included in the UNE-P costs presented by Verizon.²⁵⁰

There are other flaws in Verizon's study. For instance, Verizon includes access revenues in the retail portion of the analysis but did not include access costs in the UNE-P column. At the hearing before the NH PUC, Verizon admitted that a CLEC would not receive incoming access revenues because in a balanced calling arrangement there would be a "washout" of access revenues for incoming calls and access charges for outgoing calls.²⁵¹ Verizon did not make an adjustment in its analysis to reflect the washout.²⁵² Thus, Verizon has double-counted access revenues by assuming that CLECs would receive inbound access revenues but failing to include the costs the CLEC incurs for Verizon's claim of an offset.²⁵³ In addition, Verizon conceded that a CLEC could not assume the same level of access revenues listed in Verizon's table, which was based upon Verizon's 2000 access revenues, given reductions in access charges due to new regulations.²⁵⁴ Likewise, a CLEC would not be able to generate the toll revenue that Verizon lists in its study since toll revenue is increasingly speculative and has been steadily decreasing.²⁵⁵ As Verizon's witnesses admitted, Verizon's study also includes in the "other" category, revenue

²⁵⁰ Jan. 22, 2002 Tr. at 16: 20-24; 17: 1-4.

²⁵¹ Jan. 22, 2002 Tr. at 28: 4-8.

²⁵² Jan. 22, 2002 Tr. at 28: 9-17.

²⁵³ Exhibit 63. A copy of Exhibit 63 is found at VZ App. B-NH, Vol. 6, Tab 18. ("The access revenue includes all switched access revenue per line" including "intrastate terminating local switching and carrier common line charges that are being billed to and paid by CLECs.")

²⁵⁴ Jan. 22, 2002 Tr. at 32: 16-19. As noted above, CLEC witnesses explained that it was appropriate to exclude access and toll revenues from this calculation because access and toll revenue is declining and generating such revenue incurs a concomitant increase in costs. Furthermore, it is unlikely that CLECs will have the level of intraLATA toll revenue that Verizon does since CLECs will probably not have the high percentage of customers taking their intraLATA toll service that Verizon does.

²⁵⁵ See fn. 209, *supra*.

that a CLEC would not be able to generate without incurring additional expenses, such as revenue from Time & Materials charges and Inside Wire Maintenance.²⁵⁶

As a result of the foregoing flaws in Verizon's pricing analysis, the Commission should accord it no weight.

C. The NH PUC Determined That There Is a Price Squeeze

In the *New Jersey 271 Proceeding*, the Commission commended the NJ BPU's independent analysis of the price squeeze issue and accorded much weight to its findings.²⁵⁷ The NH PUC conducted a similar detailed analysis and determined that a price squeeze did in fact exist in New Hampshire. Specifically, the NH PUC determined that its conditions would "reduce, if not eliminate, the wholesale/retail 'price squeeze.'"²⁵⁸ This finding can only be based upon a predicate finding that absent the NH PUC's proposed conditions, there would be a price squeeze.

Unfortunately, as a result of the legislative pressure orchestrated by Verizon, the NH PUC failed to implement the conditions necessary to eliminate the price squeeze. The 2-wire loop rates were unaltered save for the rate for zone 3 (rural), which was lowered from \$34.87 to \$25.00.²⁵⁹ As noted above, however, losses in rural zones via UNE-P would range from \$24 to \$26 per month, so a \$10 reduction in loop costs in rural areas will still not help generate a profit margin. The switching reductions are a mere 17.7%. As Staff noted, "switching rates in New Hampshire are currently three times those in New York despite the fact that Verizon claims to set

²⁵⁶ Jan. 22, 2002 Tr. at 34: 5-17.

²⁵⁷ *New Jersey 271 Order* at ¶ 173.

²⁵⁸ *NH PUC Conditions Letter* at 4.

²⁵⁹ DT 01-151, June 14, 2002 Letter from Commissioners, New Hampshire Public Utilities Commission to J. Michael Hickey, President, Verizon New Hampshire at 3 ("*June 14 NH PUC Letter*"). A copy of this letter is located at VZ App. B-NH, Vol. 7, Tab 29.

its rates based on region-wide bulk purchases of switching equipment.”²⁶⁰ Thus a 17.7% reduction will be clearly insufficient. If one examines the BayRing/Network Plus profitability analysis, the reduction in switching costs does not impact the overall findings. For instance, Verizon in its price squeeze analysis states that average monthly switching costs will be **[BEGIN PROPRIETARY] XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX [END PROPRIETARY]** figure BayRing and Network Plus used in their initial price squeeze analysis. Even with this reduction, there is no prospect for profit in the residential market.

The NH PUC found that there was a price squeeze and proposed conditions that were designed to ameliorate the price squeeze. These conditions were not implemented, and the conditions to which Verizon acceded do very little to eliminate the price squeeze. New Hampshire presents the prototypical case of the price squeeze the D.C. Circuit referenced in the *Sprint* case. Verizon’s rates are set too high and preclude profitable entry into the residential market. Until Verizon’s UNE rates are sufficiently lowered to facilitate profitable entry its application for Section 271 authority in New Hampshire will not be in the public interest.

D. Verizon’s Anti-competitive Practices Exacerbate the Barriers to Competitive Entry

In addition to Verizon’s high UNE prices, Verizon’s anticompetitive practices are acting as a further barrier to entry. These anticompetitive practices cause CLECs to expend valuable time and resources and thus further exacerbate the effects of the price squeeze. The Commission has stated that it will not be satisfied that the public interest standard has been met unless there is an adequate factual record that the “BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.”²⁶¹

²⁶⁰ May 6, 2002 Staff Recommendation at 2.

²⁶¹ Michigan 271 Order, at ¶ 386.

1. Verizon's Anti-competitive and Discriminatory Interconnection Adoption Policy

In adopting its local competition rules, the Commission stated that Section 252(i) is intended to enable CLECs to obtain access to interconnection on an expedited basis, and concluded that “the nondiscriminatory, pro-competitive purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to Section 251 before being able to utilize the terms of a previously approved agreement.”²⁶² The pro-competitive benefits of a streamlined interconnection negotiation process are also reflected in certain interconnection requirements adopted as part of a number of obligations and restrictions (“Merger Conditions”) this commission imposed upon Verizon in connection with the Bell Atlantic/GTE merger.²⁶³ One such Merger Condition requires Verizon to permit a CLEC to adopt a single interconnection agreement for several or all of the Verizon states, thereby providing (1) a single set of terms and conditions for the CLEC to master; (2) an expeditious, single process for obtaining an interconnection agreement in several states, thereby avoiding the expenditure of significant financial and human resources; (3) speedy entry into Verizon states by enabling a CLEC to adopt a familiar agreement already known to it from another state; and (4) a constraint on the merged company’s ability to use its leverage to force CLECs to take a “template” agreement in order to obtain similar interconnection arrangements in all Verizon states at one time. The Commission’s clear intent in imposing this condition was to *improve* a CLEC’s ability to compete with the merged Verizon entity in order to ensure that the

²⁶² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325, at ¶ 1312 (rel. Aug. 8, 1996) (“*Local Competition Order*”).

²⁶³ *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC Rcd 1032, (rel. Jun. 16, 2000) (“*BA/GTE Merger Order*”). The Merger Conditions are Appendix D to the *Merger Order*.

merged company's increased size, improved economies of scale, and larger market share were offset by some additional advantages to its competitors to maintain a theoretical "level playing field." As demonstrated below, Verizon's performance with respect to interconnection evidences a continuing pattern of delay and obfuscation designed to impede competitors' access to the market.

The record reflects in detail Verizon's pattern of anticompetitive conduct with respect to Network Plus's request to adopt an interconnection agreement in New Hampshire, including Verizon's continuous efforts to inject unreasonable delays and other obstacles into the process.²⁶⁴

Because Verizon's conduct prevented Network Plus from being able to order and provision UNEs under its interconnection agreement, Network Plus was forced to purchase higher cost resale services in order to meet its New Hampshire customers' needs. The direct result of Verizon's action was an increase of approximately 28% in Network Plus's cost to enter the New Hampshire market.²⁶⁵

This increase in costs can mean the difference between a CLEC being able to become profitable, and thus remain a viable competitor, and being forced to withdraw from or delay entry into a particular market. This fact gives Verizon the unilateral ability to harm competition by eliminating its competitors by injecting delay and increased costs into market entry. It is this ability that makes Verizon's conduct, and its effect on competitors and competition, so important to a consideration of Verizon's request in this proceeding. If Verizon is permitted to continue its

²⁶⁴ See BayRing App. A, Tab 3, Exhibit 35 at ¶¶ 4-10; BayRing App. A, Tab 11, Network Plus, Inc. Responses to Verizon's First Set of Data Requests VZ-NP 1-6.

²⁶⁵ See BayRing App. A, Tab 11, Network Plus, Inc. Responses to Verizon's First Set of Data Requests VZ-NP 1-6.

practice of impeding market entry and increasing the costs of competition, competition and the customers of New Hampshire will suffer.

More importantly, Verizon's conduct creates delays for and increases costs to customers in New Hampshire. If a consumer selects a CLEC to provide its telecommunications services, and, as a result of Verizon's conduct, the customer is unable to obtain the services it desires or to obtain them in a timely manner, the customer is harmed. Network Plus initially submitted UNE orders to meet its customers' deadlines for service. Because of Verizon's delay in completing an interconnection agreement, Network Plus was forced to resubmit those orders as resale requests. In addition to the delay caused to the customers when Network Plus had to resubmit the orders in the first instance, those customers may experience additional disruption when their service is migrated from resale to UNE. Verizon's testimony demonstrated that Verizon's conduct in this regard is not limited to Network Plus. Specifically, Verizon's witness stated that Verizon does not permit a CLEC to order UNEs, including UNE-P, until an appropriate interconnection agreement is signed and effective.²⁶⁶ Consequently, Verizon's discriminatory conduct will continue to have adverse consequences for the CLEC and its customers well beyond the time period actually covered by Verizon's actions and omissions.

Verizon conceded that Network Plus merely requested to adopt a previously negotiated and approved interconnection agreement in accordance with Section 252(i) and Verizon's Merger Conditions.²⁶⁷ With the exception of the UNE amendment described below, which Verizon used as a reason to delay completion of the interconnection process an additional six

²⁶⁶ Dec. 6, 2001 Tr. at 55:13-15, 56:5-9.

²⁶⁷ *Verizon's Supplemental Checklist Declaration* at ¶16. Verizon's unilateral position that certain provisions of an underlying agreement are excluded from the interstate adoption requirements in the Merger Conditions (*Id.* at ¶17), while informative as to Verizon's position, is not relevant to the issue raised by Network Plus and does not

weeks, Network Plus did not request incorporation or modification of any of the provisions identified by Verizon. In fact, Verizon's witness conceded that, with respect to the initial adoption "it's out of Network Plus's hands."²⁶⁸ The distinction between a negotiated agreement and adoption of a previously approved agreement is significant, particularly in light of the fact that the purpose of providing CLECs the ability to adopt an interconnection agreement is to decrease the time and resources necessary to obtain access to interconnection and unbundled network elements. Verizon's conduct with respect to Network Plus's adoption request was anything but expeditious. Verizon admits that it did not prepare and file Network Plus's adoption agreement in New Hampshire until nearly three months after Network Plus submitted its request.²⁶⁹ This delay was made even more egregious by the fact that when Verizon finally did get around to providing Network Plus an adoption agreement, it was nothing more than a form letter with the New Hampshire rate schedule attached rather than an entirely new agreement.²⁷⁰ BayRing is hard-pressed to conceive of a situation in which a short form letter could take three months to prepare and file.²⁷¹

Moreover, to the extent that the single conversation and few e-mails between Verizon and Network Plus's counsel concerning Network Plus's requested UNE Remand Amendment could be considered a "negotiation," it is implausible that Network Plus's two, minor and non-

provide any basis for Verizon's delay in processing Network Plus's' adoption request. Significantly, Verizon's position has not been approved by the FCC.

²⁶⁸ Dec. 6, 2001 Tr. at 52:2-3.

²⁶⁹ *Verizon's Supplemental Checklist Declaration* at ¶ 16.

²⁷⁰ *See Verizon's Supplemental Checklist Declaration* at ¶ 16; Dec. 6, 2001 Tr. at 49:22-50:1.

²⁷¹ Moreover, the NH PUC approved a Bell Atlantic/Global NAPS, Inc. New Hampshire Interconnection Agreement on February 1, 1999. Bell Atlantic/Global NAPS Inc., *Order Nisi Approving Interconnection Agreement*, Order No. 23,127, Docket No. DE-98-220 (1999). If Verizon already had an existing interconnection agreement with Global NAPS in New Hampshire, which is presumably substantially the same as the Vermont agreement Network Plus requested to adopt, Verizon should not have had to conduct an extensive review of the Vermont agreement to determine which provisions it could export to New Hampshire.

controversial revisions could create an additional six-week delay in Verizon's completion of the amendment. In fact, rather than preparing the amendment simultaneously with the adoption letter, which would be reasonable given that Network Plus's submitted the requests in the same adoption request, Verizon did not even begin preparing the amendment until "it was established that Network Plus's interstate adoption of the GNAPs Vermont agreement had been signed by the parties and submitted to the Commission for approval under the Act."²⁷² As a result, Verizon was able, through an arbitrary process it controlled, to impose further delay on Network Plus's ability to obtain a complete interconnection agreement in New Hampshire.

As noted, Network Plus requested to adopt a previously approved interconnection agreement under Section 252(i) and Verizon's Merger Conditions in an effort to expedite the interconnection process. Adoption of an interconnection agreement under Section 252(i) is intended to be a more expeditious option for CLECs than negotiating or arbitrating an agreement with the ILEC. If the Act's intended expeditious option of adopting an interconnection agreement took nearly four months to complete, BayRing finds it hard to believe that actually negotiating an interconnection agreement with Verizon would have somehow shortened the process. Likewise, it is unclear how adopting a different agreement either at the beginning of or during the process would have enabled Network Plus to obtain an interconnection agreement sooner. Indeed, Verizon's witness conceded at the hearing that seeking mediation or arbitration from the NH PUC would have resulted in a lengthier delay in obtaining an interconnection agreement.²⁷³ Therefore, Verizon has failed adequately to respond to the evidence provide by Network Plus that Verizon's deliberate conduct delayed Network Plus's interconnection adoption, and thus market entry, and significantly increased the cost of such entry.

²⁷² *Verizon's Supplemental Checklist Declaration* at ¶18.

²⁷³ Dec. 6, 2001 Tr. at 55:8-9.

In response to the evidence submitted by Network Plus, Verizon offered no relevant evidence to support its request for a finding of Checklist compliance. The number of interconnection agreements Verizon has negotiated and arbitrated in New Hampshire tells the Commission nothing about Verizon's conduct during those negotiations/arbitrations. Significantly, Verizon has provided no information as to the time and cost involved for the CLECs that negotiated and/or arbitrated those agreements. Nor, for obvious reasons, does Verizon provide any information as to whether or not the delay involved in such negotiations/arbitrations impeded the ability of those CLECs to successfully enter the New Hampshire market.

Moreover, Verizon has failed to demonstrate that the pattern of delay and anticompetitive conduct Network Plus experienced will not continue when some other CLEC requests a new adoption agreement. In the absence of the need for Section 271 approval, BayRing submits that Verizon will continue to discriminate against its competitors with regard to access to interconnection.

2. Verizon's Failure to Pay Reciprocal Compensation

As reflected in the record, BayRing has been forced to endure an arduous journey to get Verizon to acquiesce to appropriate rates for reciprocal compensation for Section 251(b)(5) traffic. Verizon and BayRing had negotiated a blended rate \$0.0209 per MOU for Reciprocal Compensation Traffic and Compensable Internet Traffic.²⁷⁴ Verizon has frequently contended, incorrectly, that the cost of terminating calls to Internet Service Providers ("ISPs") is lower than the cost of terminating calls to non-ISPs.²⁷⁵ The composite rate in the parties' Interconnection

²⁷⁴ BayRing App. A, Tab 5, Exhibit 39 at ¶ 45.

²⁷⁵ Verizon's Supplemental Checklist Declaration at ¶¶ 122-126.

Agreement represented their resolution of the issue.²⁷⁶ BayRing accepted this compromise blended rate, which was lower than the Commission-approved reciprocal compensation rate, because at that time this Commission had not resolved the issue of reciprocal compensation for ISP-bound traffic and BayRing needed certainty of compensation.²⁷⁷

Verizon then attempted to seize upon this Commission's *Order on Remand*²⁷⁸ pertaining to compensation for ISP-bound traffic to lower the rate it pays for ISP-bound traffic while at the same time continuing to pay the blended rate for non-ISP bound, Section 251(b)(5) traffic. If Verizon sought to rely on the *Order on Remand* to pay lower rates for ISP-bound traffic, it should have also raised the rate that it pays BayRing for non-ISP bound, Section 251(b)(5) traffic. For Verizon to be in compliance with the Act, the blended rate must be disaggregated into a separate ISP-bound and section 251(b)(5) traffic rate.²⁷⁹ BayRing never agreed to accept \$0.00209 per MOU for non-ISP, section 251(b)(5) traffic alone.²⁸⁰ If Verizon wanted to pay the federal intercarrier compensation rate for ISP-bound traffic, Verizon should have paid the rates for Section 251(b)(5) traffic approved by the NH PUC. Verizon clearly sought to have its cake and eat it too. It wanted the benefits of the FCC *Order on Remand*, but wanted to shirk the concomitant effect that its adoption of those rates had on the rates that Verizon must pay for non-ISP bound traffic.

Verizon's actions in unilaterally implementing the new rates also did not accord with the requirements of the parties' interconnection agreement. The FCC *Order on Remand*, contrary to

²⁷⁶ BayRing App. A, Tab 5, Exhibit 39 at ¶ 45.

²⁷⁷ *Id.* at ¶ 46.

²⁷⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) ("*Order on Remand*").

²⁷⁹ BayRing App. A, Tab 5, Exhibit 39 at ¶ 47.

²⁸⁰ BayRing App. A, Tab 5, Exhibit 39 at ¶ 47.

Verizon's assertion, was not self-effecting under the terms of the parties' agreement. Section 5.7.8 of the agreement provided that when the FCC issues an order that specifies a rate or rate structure for reciprocal compensation, intercarrier compensation, or access charges that is to apply to Internet traffic, Verizon may terminate the Intercarrier Compensation provisions of the Agreement on thirty days' notice.²⁸¹ If Verizon exercises its termination right, "the Parties shall promptly amend this Agreement to reflect the terms of such order or statute, and any such amendment shall be retroactive to the effect date of the termination."²⁸² In order "to reflect the terms of such order," any amendment between Verizon and BayRing that allows Verizon to pay BayRing the federal rates applicable to ISP-bound traffic must also require Verizon to pay BayRing the rates applicable to section 251(b)(5) traffic that were approved by the NH PUC.²⁸³

Verizon also failed to comply with Section 251(b)(5) of the Act and the *Order on Remand* by billing BayRing the contractual reciprocal compensation rate for any traffic originated by BayRing and terminated by Verizon.²⁸⁴ The *Order on Remand* requires Verizon to receive, for *all* traffic, the same rate that it pays for ISP-bound traffic. This mirroring rule "ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic."²⁸⁵ The *Order on Remand* revises Verizon's obligations under Section 251(b)(5) if Verizon adopts the federal compensation scheme for ISP-bound traffic. If Verizon elected to compensate BayRing under the terms of the *Order on Remand*, then BayRing is obligated to compensate Verizon, for all traffic, at only the federal rates Verizon pays for ISP-bound traffic.

²⁸¹ *Id.* at ¶ 48.

²⁸² See BayRing App. A, Tab 5, Exhibit 4 to Exhibit 39.

²⁸³ BayRing App. A, Tab 5, Exhibit 39 at ¶ 48.

²⁸⁴ *Id.* at ¶ 51.

²⁸⁵ *Order on Remand*, at ¶ 89.

Finally to compound the effects of its egregious actions, Verizon failed to meet its payment obligations by stopping payment on a check. BayRing recently billed Verizon for reciprocal compensation for traffic terminated by BayRing for the month of September, 2001. BayRing had billed Verizon consistent with its understanding of the *Order on Remand* as described above. Verizon sent BayRing a check. This amount was less than the amount that BayRing had billed Verizon. Apparently, Verizon calculated an amount it owed to BayRing under a different understanding of the *Order on Remand*. BayRing deposited the check from Verizon. BayRing was then informed by BayRing's bank that Verizon had stopped payment on the check. Verizon never informed BayRing that it was stopping payment on the check before the bank notified BayRing. When BayRing contacted Verizon's account representative, BayRing was informed that Verizon had no explanation for the stopped payment, other than it was now unsure of the amount it owed BayRing. Verizon had stopped payment of the check until it could recalculate the amount due.²⁸⁶

The Interconnection Agreement between BayRing and Verizon provided a means for the parties to notify each other about billing disputes. It also provided a means to deposit amounts that have been billed but that are disputed into an interest-bearing escrow account.²⁸⁷ With utter disdain for its contractual obligations, Verizon unilaterally decided when and how much it will pay BayRing for services provided by BayRing. Verizon's cavalier stopping of payment on checks it has sent to CLECs, without providing prior notice, can wreak havoc with CLEC finances and cause them embarrassment (and worse) with their banks and with their cash flow.

²⁸⁶ BayRing App A, Tab 5, Exhibit 39 at ¶ 53.

²⁸⁷ BayRing App. A, Tab 5, Exhibit 39, ¶ 54.

The above issues were resolved, but only shortly before the hearings before the NH PUC.²⁸⁸ This resolution demonstrates a calculated gamble on the part of Verizon to test the resolve of CLECs like BayRing. Verizon waited until the last minute to see if the issue would imperil its application or if BayRing would accede, and then decided to act reasonably solely to further its Section 271 application. Verizon's actions do not engender any confidence that Verizon will seek to ensure that the New Hampshire market remains open to competition once the carrot of Section 271 approval has been provided. In addition, CLECs are forced to expend valuable time and money to get Verizon to comply with its legal obligations. BayRing had to spend thousands of dollars in legal fees, and untold internal personnel hours, to raise this issue before the Commission in this proceeding to get Verizon to accede to its obligations. Verizon's disdain for language in Commission-approved interconnection agreements is particularly troubling. If enforcement of every provision of an interconnection agreement requires litigation this will diminish the resources CLECs have to provide a competitive product in New Hampshire. Every unnecessary dollar expended in litigation either has to be absorbed by CLECs or passed on to its customers.²⁸⁹ Either approach would not enhance the prospects for competition in New Hampshire.

This is precisely the type of anti-competitive leveraging of local monopoly power that the public interest standard was designed to address. Verizon's conduct provides no assurance of future compliance, and, in fact, suggests a future of non-compliance with Section 271 standards. The anti-competitive practices of Verizon further only Verizon's interest, and not the public interest, and warrant denial of the application under the public interest standard.

²⁸⁸ Dec. 7, 2001 Tr. at 128: 3-7.

²⁸⁹ Either approach will diminish whatever slim profit margins there are in the business market. Of course, there are no profit margins in the residential market.

3. Verizon' s Interjection of Extraneous Provisions in UNE Remand Amendment

Late during the proceeding before the NH PUC, Verizon threatened to place an embargo on orders for EELs until BayRing agreed to sign an amendment to BayRing's interconnection agreement with Verizon.²⁹⁰ This new policy imperiled a vital order placed on December 18, 2001 for a large customer of BayRing. Verizon waited 23 days after the placement of the order to inform BayRing that it would not process that order, or other EELs orders, until BayRing executed the amendment.²⁹¹ That was the first time that BayRing had been notified of the proposed amendment. Prior to that date, Verizon was routinely processing similar EELs orders. BayRing needed the order filled by January 18, 2002, and clearly Verizon was attempting to parlay this fact into execution of the amendment. After numerous calls from BayRing's COO, Verizon finally agreed to process the order subject to BayRing signing the amendment.²⁹²

The language of the amendment contained some very problematic language. Verizon sought to include in the Pricing Appendix to the amendment a provision limiting the charges BayRing may bill Verizon for "Services", *i.e.* access services.²⁹³ This provision bears no relationship to Verizon's provisioning of EELs, and simply constitutes an attempt on the part of Verizon to leverage its control over vital facilities to secure a business advantage in an unrelated matter. This action impinges on BayRing's rights of access to unbundled network elements.

In addition, the amendment created an unreasonable disparity in what would transpire if the prevailing law as to UNE combinations were changed. If Verizon is required to provide a new UNE-combination, the amendment provides that the CLEC would have to wait for the

²⁹⁰ See BayRing App. A, Tab 13, January 14, 2002 E-Mail From Kevin Minsky, Esquire, Counsel for BayRing, to Barclay Jackson, Staff of the New Hampshire Public Utilities Commission.

²⁹¹ *Id.*

²⁹² *Id.*

terms, conditions and pricing of the combination to be tariffed, or an agreement executed between the parties, to partake of the new combination.²⁹⁴ Thus, Verizon had every incentive to dally in tariffing the new combination or negotiating in good faith. If, however, Verizon was no longer required to provide the combination, Verizon claimed it had the right to terminate immediately the provisioning of the combination.²⁹⁵ This would put the CLEC customer out of service.

Verizon also claimed the right in regard to new rates that it was developing that it could begin billing the new rates immediately after giving the CLEC the appropriate notice by letter.²⁹⁶ BayRing, rightfully demanded that only after the new rate is duly tariffed and approved by the appropriate regulatory body could Verizon begin billing the new rate. Verizon also claimed the right to post the terms and conditions for its combination products in electronic form, *i.e.*, its web site, and be able to amend the terms via its web site.²⁹⁷ This would render the parties' agreement a virtual nullity at least as far as Verizon is concerned, because it could amend the terms freely, while the CLEC would be bound by the Agreement. Verizon also sought the ability to be able to price differently a service if the service was offered to comply with Section 271(c)(2)(b) than if it was required to offer the service under Sections 251 and 252.²⁹⁸ Verizon is clearly trying to limit in a discriminatory manner the market-opening actions mandated by Section 271. Section 271, however, in regard to network elements, tracks the requirements of Section 251 (c)(3) and

²⁹³ *Id.*, BayRing App. A, Tab 19, Pricing Appendix to Combinations Attachment, § 2.

²⁹⁴ BayRing App. A, Tab 19, UNE-Combination Amendment, § 1.4.

²⁹⁵ BayRing App. A, Tab 19, UNE-Combination Amendment, § 1.5.

²⁹⁶ BayRing App. A, Tab 19, UNE-Combination Amendment, § 1.7.

²⁹⁷ BayRing App. A, Tab 19, UNE-Combination Amendment, § 2.0.

²⁹⁸ BayRing App. A, Tab 19, UNE-Combination Amendment, Pricing Appendix to Combinations Attachment § 3.0.

252(d)(1).²⁹⁹ Thus, Verizon's position was particularly indefensible. Finally, neither the Amendment nor attachments explained how BayRing would be charged for the UNE combinations. The pricing information was incomplete. BayRing had to specify how the prices would be assessed.

This Commission has ruled that "although an applicable interconnection agreement is required for Verizon to bill for any converted EELs, Verizon is not permitted to require CLECs to execute unneeded amendments or amendments with unfavorable terms as a condition to the conversion of their special access circuits to EELs."³⁰⁰ The conditions Verizon sought to impose were clearly impermissible.

As with the reciprocal compensation issue, Verizon eventually retreated to a more reasonable position. Once again, such a compromise came at a heavy price to BayRing, which had to expend outside counsel fees and the precious time and resources of its management to resolve the issue. Instead of being able to focus on providing the best product to their customers, Verizon's conduct forces CLECs to expend time on issues such as these. Section 271 authority should be a sign that a market is open and functioning properly. Verizon's practices demonstrate the exact opposite. Until Verizon can demonstrate a period of sustained pro-competitive practices, or at very least competitively-neutral practices, the Commission should withhold Section 271 authority.

4. Verizon's inadequate provisioning

Verizon's woefully inadequate provisioning of unbundled network elements to BayRing plainly demonstrates that Verizon has erected unnecessary and anti-competitive roadblocks that

²⁹⁹ 47 U.S.C. § 271 (c)(2)(B)(ii).

³⁰⁰ *In the Matter of Net2000 Communications, Inc. v. Verizon-Washington, D.C., Inc., et al.*, File No. EB-00-018, Memorandum Opinion and Order, FCC 01-381, ¶ 37 (Jan. 9, 2001).

impede the development of local competition in New Hampshire. As discussed in Section III.C., *supra*, Verizon's improper actions involve: (a) consistent disregard of crucial order dates that unjustifiably increase BayRing's costs and cause inconvenience and operational difficulty for consumers that have opted to utilize the services of a Verizon competitor; (b) provisioning systems that are generally inefficient and do not permit the timely and smooth coordination of activities with BayRing; (c) employment of personnel who do not possess the necessary experience or common sense to provision BayRing's orders in an appropriate manner; and (d) use of service representatives who lack knowledge of Verizon's internal escalation procedures with regard to resolution of service disruptions.³⁰¹

The adverse impact of Verizon's anticompetitive actions on BayRing's ability to retain and attract customers cannot be overestimated. Although BayRing provided ample support for its claims that Verizon's provisioning practices caused significant harm to its operations,³⁰² Verizon merely tried to downplay the significance of BayRing's difficulties in lieu of attempting to offer any substantive response to BayRing's evidence.³⁰³ Verizon's failure to adequately provide timely, nondiscriminatory access to UNEs further underscores the fact that its anticompetitive practices run counter to the public interest standard that is critical to the Commission's Section 271 evaluation.

5. Verizon's delays in providing dark fiber terms that conform to NH PUC Order No. 22,942

The NH PUC ordered Verizon to provide unbundled dark fiber "to any requesting telecommunications carrier" in accordance with the terms and conditions set forth by the NH

³⁰¹ BayRing App. A, Tab 4, Exhibit 37 at ¶¶ 25-44.

³⁰² *Id.*

³⁰³ *Verizon Supplemental Checklist Declaration* at ¶ 90.

PUC in Order No. 22,942.³⁰⁴ The NH PUC obviously viewed the terms mandated by its Dark Fiber Order as “just” and “reasonable” terms for the provisioning of unbundled dark fiber in conformance with Section 251(c)(3) of the Act. Contrary to the clear direction of the NH PUC in Order No. 22,942, Verizon initially refused to incorporate terms for unbundled dark fiber into an interconnection agreement that conform to the *NH Dark Fiber Order*. Specifically, during a telephone conference on September 26, 2001, Verizon informed CTC that as a matter of general policy, absent arbitration, Verizon would not enter into an interconnection agreement with CTC or any other CLEC that provides terms and conditions for unbundled dark fiber that conform to the Commission’s *NH Dark Fiber Order*.³⁰⁵ Verizon also confirmed that the terms and conditions mandated by the Commission’s Dark Fiber Order are not available to CLECs by tariff.

Under Verizon’s policy, dark fiber terms that conformed to the *NH Dark Fiber Order* were unavailable to CLECs in either a tariff or interconnection agreement and could only be obtained if a CLEC agreed to adopt Verizon’s entire SGAT on a take it or leave it basis, as its entire interconnection agreement without negotiating a single term. In other words, in order to obtain unbundled dark fiber on the terms mandated by this Commission, Verizon insisted that a CLEC to give up both its statutory right to negotiate other sections of its interconnection agreement pursuant to Section 252(a) of the Act, and its statutory right to pick-and-choose terms from other interconnection agreements pursuant to Section 252(i) of the Act. Thus, as a practical matter, Verizon’s policies regarding dark fiber terms and conditions effectively forced CLECs to make a Hobson’s choice between foregoing other interconnection priorities or foregoing access

³⁰⁴ *Order Finding Dark Fiber Subject to the Unbundling Requirement of Section 251 of the Telecommunications Act of 1996*, Order No. 22,942, DE 97-229, at 9 (NH PUC May 19, 1998) (“*NH Dark Fiber Order*”). A copy of this Order is found at VZ App. H-NH, Vol. 1, Tab 1.

³⁰⁵ BayRing App. A, Tab 1, Exhibit 33 at ¶ 16.

to unbundled dark fiber on the terms mandated by the Commission. Verizon's policies at that time clearly violated both the Commission's Dark Fiber Order on its face and the Act.³⁰⁶

Accordingly, CTC and BayRing raised this issue in the Section 271 proceeding in their Declarations on October 1, 2001. On November 14, 2001, Verizon filed its Supplemental Checklist Declaration in which it indicated for the first time that it would make dark fiber available to CLECs "in accordance with the guidelines contained in this Commission's Order No. 22,942, under Verizon's [SGAT] *or an interconnection agreement*."³⁰⁷ Despite this apparent change in policy, Verizon's negotiator did not agree to incorporate dark fiber terms and conditions into CTC's interconnection agreement that conform to Order No. 22,942 and are substantially similar to the terms already set forth in Verizon's SGAT at section 5.16 until January 18, 2002.³⁰⁸

Although Verizon eventually capitulated and decided to offer dark fiber terms that conform to Order No. 22,942, Verizon forced CTC and BayRing to incur expenses needlessly for outside counsel fees and waste precious management time and resources to resolve the issue. Verizon's conduct in this instance further demonstrates that it continues to impose additional barriers to the opening of the New Hampshire local market at nearly every opportune moment. Verizon's failure to cooperate in opening its network to competitors provides ample grounds to provide an unfavorable recommendation regarding its Section 271 application.

6. Verizon's failure to provide the information mandated by the NH Dark Fiber Order

³⁰⁶ BayRing App. A, Tab 1, Exhibit 33 at ¶¶ 16-17.

³⁰⁷ *Verizon Supplemental Checklist Declaration* at ¶ 107 (emphasis added).

³⁰⁸ Verizon has not yet proposed specific dark fiber terms for CTC's interconnection agreement that conform to the NH Dark Fiber Order, however, in a Jan. 21, 2002 email Verizon stated its intention to do so.

The *NH Dark Fiber Order*, issued in 1998, and Verizon's SGAT require that Verizon provide a written reply to a CLEC's written inquiry regarding dark fiber availability "within thirty (30) days from receipt of the [CLEC's] request" when Verizon deems unbundled dark fiber not available, including specific reasons why the request cannot be granted, including the following information:

total number of fiber sheath and strands between points on the requested routes, number of strands currently in use and the transmission speed on each strand (e.g. OC-3, OC-48), the number of strands in use by other carriers, the number of strands reserved for Bell Atlantic's use, the number of strands lit in each of the three preceding years, the estimated completion date of any construction jobs planned for the next two years or currently underway, and an offer of any alternate route with available dark fiber. In addition, for fibers currently in use, Bell Atlantic shall specify if the fiber is being used to provide non-revenue producing services such as emergency service restoration, maintenance and/or repair.³⁰⁹

This information is essential in order for a CLEC to assess the veracity of a claim by Verizon that dark fiber is not "available" on a particular route.³¹⁰ Notwithstanding the Commission's explicit direction in the *NH Dark Fiber Order*, Verizon routinely failed to provide a written reply to CTC, BayRing and other CLECs containing the specific information set forth above when it denied a CLEC request for unbundled dark fiber.³¹¹ In fact, out of the 90 dark fiber inquiries it rejected between January 2000 and July 2001, Verizon provided the information required by the *NH Dark Fiber Order* only once.³¹²

During the hearing before the NH PUC, Verizon revealed for the first time to CTC and BayRing (and, indeed, to the NH PUC Staff) that it interpreted the *NH Dark Fiber Order* and its

³⁰⁹ BayRing App. A, Tab 2, Exhibit 34 at ¶ 9; *NH Dark Fiber Order*, at 8 (emphasis added); Verizon's SGAT, at § 5.16.2(E).

³¹⁰ BayRing App. A, Tab 2, Exhibit 34 at ¶ 10.

³¹¹ BayRing App. A, Tab 2, Exhibit 34 at ¶ 10-11; BayRing App. A, Tab 4, Exhibit 37 at ¶ 48; BayRing App. A, Tab 5, Exhibit 39 at ¶ 36.

³¹² BayRing App. A, Tab 2, Exhibit 34 at ¶ 11; BayRing App. A, Tab 5, Exhibit 39 at ¶ 36; Dec. 10, 2001 Tr. at 112:15-113:10, 198:16-199:6; Exhibit 57. A copy of Exhibit 57 can be found at VZ App. B-NH, Vol. 6, Tab 14.

own SGAT as implementing a “two-step” process in which a second request from CLEC is required after the CLEC’s initial dark fiber inquiry is rejected before Verizon will provide the information mandated by the Order.³¹³ Verizon’s interpretation that a second request is required before Verizon need provide information explaining why a CLEC inquiry for dark fiber was rejected is not supported either by the terms of the *NH Dark Fiber Order* or the terms in its own SGAT that ostensibly implements the *NH Dark Fiber Order*.³¹⁴

More specifically, Verizon’s SGAT provides at Section 5.16.2(A) that a CLEC “must submit a written inquiry to [Verizon] to conduct a review of its existing cable records to determine whether spare dark fiber is available.”³¹⁵ The SGAT then sets forth two possible responses by Verizon depending upon whether or not spare dark fiber is available.³¹⁶ If spare dark fiber is available, then SGAT Section 5.16.2(D) requires Verizon to notify the CLEC and “provide the estimated mileage and number of intermediate offices, if applicable . . . [and] an estimate of the applicable rates and charges.”³¹⁷ If dark fiber is not available, then SGAT Section 5.16.2(E) requires Verizon to notify the CLEC “in writing within thirty (30) days of the [CLEC’s] request” and provide the CLEC with the information set forth in the *NH Dark Fiber Order*.³¹⁸ Nowhere in the SGAT or the *NH Dark Fiber Order* is a second request mentioned, nonetheless, Verizon witness Detch attempted to identify a requirement for a second request through a strained reading of Section 5.16.2(E).³¹⁹ Verizon’s contrived reading of its SGAT is

³¹³ Dec. 10, 2001 Tr., at 20-26.

³¹⁴ Dec. 10, 2001 Tr. at 20-26, 37-38.

³¹⁵ Verizon SGAT, § 5.16.2(A); Dec. 10, 2001 Tr. at 19:3-7.

³¹⁶ Dec. 10, 2001 Tr. at 19:13-17.

³¹⁷ Dec. 10, 2001 Tr. at 19:18-20; Verizon’s SGAT, § 5.16.2(D).

³¹⁸ Verizon’s SGAT, § 5.16.2(E).

³¹⁹ Dec. 10, 2001 Tr. at 20-24, 57-59.

inconsistent with the plain meaning of the *NH Dark Fiber Order*. The *NH Dark Fiber Order* plainly states that:

The NH PUC will allow [Verizon] *30 days to reply in writing to a request for access to dark fiber*. If [Verizon] denies the access requested, [Verizon] *shall include in its written reply the reason the request cannot be granted*. The reason must be specific and include the following

Clearly, the *NH Dark Fiber Order* contemplated only *one* CLEC request and a written reply by Verizon providing a detailed explanation as to why access to dark fiber cannot be provided in response to the request *to that request* (not to some undisclosed and unspecified second CLEC request).³²⁰

In sum, Verizon has routinely and systematically failed to provide a written reply to CLECs containing the information required by the *NH Dark Fiber Order* when it denies a CLEC's dark fiber inquiry. During the hearing before, Verizon for the first time clarified its "two-step" policy and retreated to a more reasonable position by agreeing to add a box on the dark fiber inquiry form that CLECs could check to indicate that they wanted the information required under the *NH Dark Fiber Order* in the event their initial dark fiber inquiry is denied.³²¹ Once again, Verizon's clarification and its more reasonable position came to light only in response to Declarations filed by CTC and BayRing in the NH PUC's proceeding and only after, through its incredibly distorted reading of the very clear language in the *NH Dark Fiber Order*, Verizon forced CTC and BayRing to incur legal expenses and waste valuable management time and resources bringing Verizon's lack of compliance with the *NH Dark Fiber Order* to the attention of the Commission. Verizon's conduct in this instance further demonstrates that it

³²⁰ *NH Dark Fiber Order*, at 8; Dec. 10, 2001 Tr. at 20-24, 57-58 ((Staff Attorney Jackson) "The language in that order was very clear as to how responses should be made to inquiries . . . You're now telling me today 'Oh, no, that's not what we do. And, we interpret [Section 5.16.2(E)] to be a separate request, although admittedly, we can see why you would interpret it as the first request.' So, I am very troubled that the SGAT, which seems to comport with the earlier order, . . . I'm now being told that 'no, it doesn't comport with the earlier order.'").

³²¹ Dec. 10, 2001 Tr., at 49:5-10.

continues to impose additional barriers to the opening of the New Hampshire local market at nearly every opportune moment. Verizon's failure to cooperate in opening its network to competitors provides ample grounds to provide an unfavorable recommendation regarding its Section 271 application.

V. CONCLUSION

For the foregoing reasons, BayRing respectfully requests that the Commission deny Verizon's application for Authorization to Provide In-Region, InterLATA Services in New Hampshire.

Respectfully submitted.

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